Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

BellSouth Telecommunications, Inc.	)	
Petition for Forbearance	)	**WC Docket No. 04-48**
Under 47 U.S.C. § 160(c)	)	
	)	

BELLSOUTH REPLY COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth") submits the following reply comments in response to comments filed in opposition to BellSouth's Petition for Forbearance ("Petition") filed in this docket.

I. INTRODUCTION AND SUMMARY

On March 1, 2004 BellSouth requested that the Commission act in accordance with the forbearance authority set forth in section 10 of the Telecommunications Act[1] and forbear from applying the terms of section 271(c)(2)(B)[2] to the extent, if any, those provisions impose unbundling obligations of broadband elements on BellSouth that the Commission has determined should not be imposed on local exchange carriers pursuant to section 251(d)(2).[3] The Petition sought exactly the same forbearance relief that the Verizon Telephone Companies requested in a similar petition.[4]

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1 47 U.S.C. § 160.

2 47 U.S.C. § 271(c)(2)(B).

3 47 U.S.C. § 251(d)(2).

4 *See* Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Kevin Martin, Commissioner Michael Copps and Commissioner Jonathan Adelstein, CC Docket No. 01-338 (filed Oct. 24, 2003); and *Commission Establishes Comment Cycle for New Verizon*

The Commission should grant BellSouth's application for forbearance from specific unbundling requirements for broadband elements under the provisions of section 271. The conditions for forbearance have clearly been met because unbundling of broadband elements, where the Commission has found no impairment: (a) is not necessary to ensure that charges are just and reasonable and are not unreasonably discriminatory; (b) is not necessary for the protection of consumers; and (c) is consistent with the public interest. In these circumstances, the statute directs the Commission to exercise its forbearance authority.

Because BellSouth seeks the same relief as that requested by Verizon and the other BOCs, most of the entities that oppose the Petition referred to their comments filed in other proceedings or attached them to a brief summary. Thus, the arguments against the Petition are no different than those that were made against the BOC Petitions. Verizon, SBC, and Qwest fully responded to the oppositions to forbearance and BellSouth attaches a copy of their responses in this proceeding.[5] Verizon's, SBC's, and Qwest's responses are both compelling and complete, and accordingly, BellSouth, rather than restating them here, concurs in them.

While no need exists to republish a rejoinder to each of the issues that were initially raised against the Verizon, SBC, and Qwest Petitions and now are raised against the BellSouth Petition, it nevertheless is appropriate to address an *ex parte* letter that AT&T filed recently after

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Petition Requesting Forbearance from Application of Section 271, CC Docket No. 01-338, *Public Notice*, FCC 03-263 (rel. Oct. 27, 2003) (noting that the Verizon October 24 letter will be treated as a new forbearance petition and establishing comment cycle for same). Subsequent to Verizon filing its petition, both SBC, *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 1601(c),* WC Docket No. 03-235, Petition for Forbearance of SBC Communications, Inc. (filed Nov. 6, 2003) and Qwest, *In the Matter of Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c),* WC Docket 03-260, Petition for Forbearance of Qwest Communications International Inc. (filed Dec. 18, 2003), filed similar petitions (Verizon's, SBC's, and Qwest's petitions are collectively referred to as the "BOC Petitions").

[5] Verizon's Petition and Reply are included as attachment 1; SBC's Petition and Reply are included as attachment 2; Qwest's Petition and Reply are included as attachment 3.

the Verizon, SBC, and Qwest responses were filed.[6] Thus, the remainder of this reply addresses specific issues raised in the AT&T Letter. In this letter AT&T continues to present objections based on the view that forbearance from applying independent section 271 unbundling obligations on broadband facilities is precluded by section 271(d)(4) and section 10(d). AT&T also continues its claim that BellSouth has not met the requirements of section 10(a). As discussed below, these objections are without merit.

As an initial matter, the D.C. Circuit's opinion in *USTA*[7] concerning the appeal of *Triennial Review Order*[8] does not impact BellSouth's Petition. In *USTA*, the Court did not find the Commission's interpretation of an existence of an independent unbundling obligation under section 271 to be unreasonable. It did not find, however, such an obligation to be required. BellSouth has asked for the Commission to reconsider this finding and that petition is still pending before the Commission.

II. THE PETITION IS NOT PRECLUDED BY SECTIONS 271(d)(4) or 10(D)

Section 271(d)(4). First, AT&T argues that the Petition is precluded by section 271(d)(4) of the Telecommunications Act of 1996 ("Act"). AT&T claims that the "plain text" of the statute forever forecloses the Commission's ability to forbear from the checklist items in

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6 Letter from David L. Lawson, Sidley, Austin, Brown, & Wood, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-338, WC Docket Nos. 03-235 and 03-260 (Mar. 3, 2004) ("AT&T Letter"). AT&T attached this letter to its summary comments filed in this proceeding.

7 *United States Telecom Ass'n v. FCC*, No. 00-1012, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004).

8 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

section 271(c)(2)(B). This narrow reading of section 271(d)(4), however, was not Congress's intent and is easily demonstrated when AT&T's position is carried to its logical conclusion.

Section 271 governs a Bell operating company's ("BOC's") entry into interLATA services. Congress enacted section 271 to govern how and when a BOC may begin to provide interLATA services that originate within the BOC's in-region states.[9] The entire section focuses on the steps that a BOC must perform in order to obtain the relief necessary to provide interLATA services. In enacting the administrative provisions, section 271(d),[10] Congress established the process that a BOC and the Commission must follow for applications filed by the BOC to obtain interLATA relief. One requirement within that process was the Commission's inability to limit or expand the competitive checklist items in conducting its review of a BOC's application to provide interLATA services within a specific state. AT&T's position that this section of the statute forever precludes the Commission's forbearance authority is contrary to section 10 of the Act and makes no sense. Clearly, it is not Congress's intent that these checklist

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[9] *See In the Matters of Section 272(b)(1)'s "Operate Independently" Requirements for Section 272 Affiliates, et al.*, WC Docket No. 03-228, *et al., Report and Order in WC Docket No. 03-228, Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337*, FCC 04-54, ¶ 2 (rel. Mar. 17, 2004) ("Sections 271 and 272 of the Act, which were added by the Telecommunications Act of 1996, establish a comprehensive framework governing BOC provision of 'interLATA services'"); *In the Matter of 1998 Biennial Regulatory Review—Testing New Technology,* CC Docket No. 98-94, *Notice of Inquiry*, 13 FCC Rcd 21879, ¶ 32 (1998) ("Section 271 of the Communications Act sets out the necessary steps that a Bell Operating Company must take before it will be allowed to offer long distance service originating in any of its in region states.")

[10] Section 271(d) establishes the administrative procedures a BOC must use to seek interLATA relief: section 271(d)(1) sets forth the application process; section 271(d)(2) establishes the consultation process that the Commission must use in reviewing the application filed by the BOC; section 271(d)(3) establishes the standard for approving or denying an application and the time frame around when the Commission must act on the application; section 271(d)(4) addresses the Commission's inability to limit or extend the checklist items prior to approval of an application; section 271(d)(5) sets forth when the Commission must report its order regarding a BOC's application in the Federal Register; and section 271(d)(6) addresses the Commission's enforcement procedures of an approved application.

items would extend in perpetuity but instead are items that the Commission could not expand or limit in evaluating a 271 application.

AT&T claims the Bells' interpretation of section 10(d) "trumps the express limitation created by section 271(d)(4) on the Commission's power as it relates more specifically to the section 271 checklist."[11] To the contrary, it is AT&T that would limit the broad authority granted to the Commission through section 10 with the section 271(d)(4) language that only applies to the sections 271 application process.[12] AT&T goes on to state that the "Bells' proposed construction would accord no coherent meaning to the phrase 'or otherwise.'" [13] AT&T dissembles the text of the statute in reaching this conclusion. The statute states that the "Commission may not, by rule or otherwise, limit *or extend* the terms used in the competitive checklist." The phrase "or otherwise" was needed to confine the Commission's ability to extend the terms of the checklist prior to granting BOCs' section 271 applications. When viewed properly – that section 271(d)(4) applies to the limitation and the extension of the terms of the checklist items before the approval of the BOC's section 271 applications – sections 271(d)(4) and 10(d) flow logically. Indeed, it is AT&T's reading of the statute that provides no coherent meaning to section 10(d). Congress would not have acknowledged the ability to forbear from the requirements of section 271, once those requirements are fully implemented, only to take away such forbearance authority. AT&T argues that the Commission may forbear from other section

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11 AT&T Letter at 3.

12 Moreover, the canon on which AT&T relies applies only if there is an inescapable conflict between the specific provision and the general provision of the statutes. *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982). As discussed above, there is no conflict between section 271(d)(4) and section 10(d).

13 AT&T Letter at 3.

271 requirements, but this claim is little more than the regulatory sleeves-out-of-the vest as the other requirements have little impact once a BOC obtains section 271 relief.[14]

Section 10(d). AT&T's arguments that the Petition is precluded by section 10(d) of the Act are equally erroneous. Section 10(d) states, "the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[15] AT&T first claims that Congress's use of the term "those requirements" signifies that Congress intended for all requirements of section 271 to be fully implemented before the Commission can forbear from any section 271 requirements. AT&T theorizes that if the Congress had intended for forbearance to apply to specific section 271 requirements once those specific requirements were implemented, Congress would have used the term "that requirement" in the text of the statute. The claim is completely nonsensical. First, Congress's use of "those" does not limit forbearance to all requirements of section 271. The term "those" could just as easily have been included to mean each individual requirement or the requirements in the aggregate, or both. AT&T cannot legitimately claim that it can only mean the requirements in the aggregate. Second, the term "those requirements" is referring back to "the requirements of section 251(c) or 271," thus, the use of plural "those" is necessary because it is speaking of both sections 251(c) and 271, not intended to mean all the requirements of section 271.

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[14] AT&T cites as an example section 272 requirements as referenced in section 271(d)(3)(B). While these requirements are certainly burdensome, Congress intended on these requirements to be eliminated after a three-year sunset period. Moreover, the Commission has already determined that the requirements of section 272 will sunset for a state three years from a BOC receiving authority to provide interLATA services within that particular state. *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, *Memorandum Opinion and Order*, 17 FCC Rcd 26869 (2002).

[15] 47 U.S.C. § 160(d).

AT&T also misconstrues the Commission's order denying Verizon's petition for forbearance from rules established to implement section 272(b)(1).[16] In the *Verizon Forbearance Order*, the Commission clearly examined the forbearance of a specific provision in a statute to determine whether forbearance was applicable for that particular section. AT&T contends that the Commission's "observation" that it did not opine on whether the requirements of section 271(c) had been fully implemented only means that it did not need to because "there was not even 'full implementation' of the very provision from which Verizon was seeking forbearance."[17] The Commission's own statement for the *Verizon Forbearance Order* demonstrates the fallacy of this claim. In making its decision that section 272, which it found to be incorporated into section 271 by reference, was not fully implemented as required by section 10(d), the Commission stated, "[o]ur analysis here applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does not address whether any other part of section 271, such as the section 271(c) competitive checklist, is 'fully implemented.'"[18] If the Commission cannot forbear from any specific provision of section 271 but must instead only forbear from the entire section once it is fully implemented in its entirety, as AT&T wrongfully claims, then the Commission would not analyze specific provisions to determine whether that provision had been fully implemented. It would instead conduct only an analysis of section 271 in its entirety. And, AT&T's position would make the Commission's statement superfluous and confusing. Indeed, if AT&T's position were correct,

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16 *In the Matter of Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, *Memorandum Opinion and Order*, 18 FCC Rcd 23525 (2003) ("*Verizon Forbearance Order*").

17 AT&T Letter at 5.

18 *Verizon Forbearance Order*, 18 FCC Rcd at 23530, ¶ 6.

because the Commission found section 272 to be incorporated into section 271 by reference, and because the Commission found that section 272 is not fully implemented, the Commission would have simply stated that section 271 is not fully implemented and section 10(d) prohibits forbearance until it is fully implemented in its entirety. To accept AT&T's position, one would have to believe the Commission went out of its way to add confusion to this area. To accept BellSouth's position, the opposite is true – the Commission made the statement to clarify that the "fully implemented" standard of section 10(d) applies to specific requirements of section 271.

Fully Implemented Standard. AT&T next contends that even if the Commission could forbear from the specific checklist items of section 271, it cannot do so until that section of section 271 is fully implemented and goes on to argue that the checklist items of section 271 have not been fully implemented. AT&T then spends a significant portion of its letter trying to reconcile its contention that "fully implemented" as used in section 271(d)(3)(A)(i) regarding the competitive checklist does not mean the same as "fully implemented" in section 10(d) when the BOCs are seeking forbearance from certain sections of the competitive checklist. The effort is in vain because AT&T's position is inconsistent and irreconcilable. The facts of the matter are: (a) as demonstrated above, the Commission may forbear from specific requirements of section 271 once those requirements have been fully implemented; and (b) the Commission has found, through the approval of BellSouth's section 271 applications in all 9 of its in-region states, that the competitive checklist has been fully implemented pursuant to section 271(d)(3)(A)(i). AT&T derides these facts when offered by other BOCs as nothing more than "time-worn arguments" that do not support the section 10(d) statutory definition of fully implemented. Time-worn arguments, however, are the best when they are right.

AT&T relies on an *ex parte* letter filed by joint CLECs for the proposition that the same words used in different sections of the same statute do not have to retain the same meaning.[19] While BellSouth does not dispute that such canon of statutory construction exists, it is completely inapplicable to this situation where the context of the statute is addressing the same circumstances. BellSouth is seeking forbearance from the same section of the statute that the Commission found to be fully implemented by virtue of granting BellSouth's section 271 applications. AT&T's attempt to obfuscate this issue is based largely on its insistence that section 10(d) requires full implementation of section 271 in whole but, as discussed above, there is simply no statutory basis to support AT&T's claim. Indeed, there is no argument that the term "fully implemented" is ambiguous as it relates to the competitive checklist as Congress specifically established a set of ground rules for the Commission to follow in order to make that determination. To conclude that the checklist had been fully implemented required state public service commissions and the Commission approximately six years of intense scrutiny and BellSouth to expend hundreds of millions of dollars to have the Commission conclude that the "fully implemented" standard had been achieved. It is now absurd for AT&T to attempt to argue that that amount of work and effort somehow falls short of the "fully implemented" standard from section 10(d).

III. THE REQUIREMENTS OF SECTION 10(a) HAVE BEEN MET

In the remainder of its letter, AT&T argues that the Bells have not met the requirements of section 10(a). The arguments are completely unsupportable. The Commission's analysis in the *Triennial Review Order* clearly found that CLECs are not impaired without access to

[19] Letter from Jonathan Askin, Association for Local Telecommunications Services, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 03-260, 03-235, 03-220, 03-157, 03-189 and CC Docket No. 01-338 (Mar. 1, 2004).

broadband elements. This finding by the Commission was based on an extensive record that fully supports the elements of section 10(a). AT&T's claims ignore these findings. Moreover, AT&T mischaracterizes the *USTA* opinion as a feeble attempt to support its claims. AT&T inconceivably argues that the D. C. Circuit's findings in *USTA* regarding hybrid fiber loops "foreclosed" the BOCs ability to show the requirement of section 10(a)(1) had been met. The *USTA* court, however, rejected the CLECs', including AT&T's, arguments regarding hybrid fiber loops and found that the Commission's conclusions were neither arbitrary nor capricious and therefore upheld the Commission's decision. In light of the relief BellSouth seeks – forbearance from unbundling broadband elements under section 271 where the Commission has found CLECs are no longer impaired under section 251 – AT&T seems confused over the D.C. Circuit's findings in *USTA*.

AT&T's other arguments are equally suspect. For example, AT&T attempts to ignore the realities of the broadband market and dismisses competition in the market as nothing more than a duopoly between cable modem and phone companies. Aside from the fact that AT&T fails to acknowledge the fast-growing wireless data market, this argument ignores the Commission's and the D.C. Circuit's findings[20] in evaluating the broadband market and determining that lack of access to these unbundled elements does not impair an entity's ability to compete in the market. This finding by the Commission is proof that the criteria of section 10(a) have been met regarding an unbundling of broadband elements pursuant to section 271.

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[20] *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002); *Triennial Review Order*, 18 FCC Rcd at 16978.

CONCLUSION

For the reasons set forth above and in the attachments, the Commission should grant the relief requested in the Petition.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: /s/ Stephen L. Earnest
Richard M. Sbaratta
Stephen L. Earnest

Its Attorneys

BellSouth Telecommunications
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375
(404) 335-0711

Dated: March 22, 2004

WC Docket No. 04-48
Attachment 1

Susanne A. Guyer
Senior Vice President
Federal Regulatory Affairs

1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2534
Fax 202 336-7858
susanne.a.guyer@verizon.com

October 24, 2003

Ex Parte

Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, DC 20544

Re: *Verizon Petition for Forbearance, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Dkt No. 01-338

Dear Chairman Powell and Commissioners:

Verizon's petition for forbearance from any separate unbundling obligation that section 271 may be read to impose for elements that do not have to be unbundled under section 251 is critical to Verizon's design, deployment and efficient operation of next generation broadband networks.

The need for forbearance *now* with respect to broadband elements is especially crucial because Verizon is today designing, testing and planning the next-generation broadband networks that will be deployed beginning in early 2004. Indeed, although Verizon's petition originally requested forbearance with respect to *all* elements that do not have to be unbundled under section 251, the broadband issue is sufficiently urgent that we hereby withdraw our request for forbearance with respect to any narrowband elements that do not have to be unbundled under section 251.

Specifically, the portion of the forbearance petition that remains pending relates to the broadband elements that the Commission has found do not have to be unbundled under section 251, including fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching.

We trust that narrowing and simplifying the range of issues so that the Commission can focus on the issues uniquely affecting broadband will facilitate prompt approval of the forbearance request with respect to broadband elements. Indeed, the Commission already made

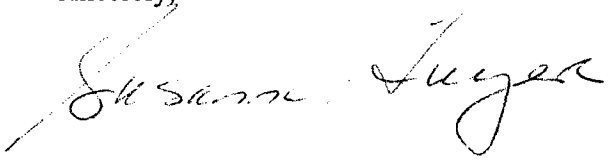
the findings in the *Triennial Review Order* that warrant forbearance with respect to any residual obligations that section 271 may be read to impose for broadband.

In its *Triennial Review Order*, the Commission expressly found that imposing unbundling obligations on broadband facilities is both unnecessary, because competing providers do not need access to those facilities, and affirmatively harmful, because it would "undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology," *Order* ¶ 3. The Commission also found that "relieving incumbent LECs from unbundling requirements for those networks will promote investment in, and deployment of, next-generation networks," and "[t]he end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services." *Id.* ¶ 272.

These same findings warrant forbearance from any separate unbundling obligations that may apply under section 271 of the Act. As the accompanying paper explains at greater length, imposing unbundling obligations under either section 251 or 271 would have all the same negative effects on broadband deployment. And, of course, granting forbearance also is consistent with the specific statutory mandate in section 706 to encourage deployment of and remove barriers to investment in broadband facilities, including through the exercise of the Commission's "regulatory forbearance" authority.

Consequently, the Commission should promptly grant Verizon's petition for forbearance from any unbundling obligations that section 271 might be read to impose with respect to broadband elements.

Sincerely,



Attachment

cc: Bryan Tramont
Chris Libertelli
Matt Brill
Dan Gonzalez
Jessica Rosenworcel
Lisa Zaina
Bill Maher

THE COMMISSION SHOULD FORBEAR FROM IMPOSING ANY SECTION 271 UNBUNDLING OBLIGATIONS ON BROADBAND

EXECUTIVE SUMMARY

On July 29, 2002, Verizon filed a petition for forbearance seeking relief from any unbundling obligations that section 271 may impose for elements that the Commission has separately removed from the list of elements subject to unbundling under section 251. This paper discusses the particularly pressing need to forbear from any such obligations for *broadband* elements.

The *Triennial Review Order* provided simply that ILECs "do not have to offer unbundled access" to broadband facilities such as fiber to the premises loops, the packetized functionality of hybrid loops, and packet switching.[1] The Commission's resolution of the issue was appropriately straightforward, and was based both on its conclusion that unbundling broadband facilities is *unnecessary* because competing providers do not need access to those broadband facilities and that it is affirmatively *harmful* because it would deter deployment by all providers. And those conclusions were further reinforced by the separate injunction in section 706 to encourage deployment of and remove barriers to investment in broadband facilities. Nothing in the *Order* suggests that its conclusions with respect to broadband facilities were somehow compromised by a continuing need to unbundle these same facilities under some different provision of the Act.

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and FNPRM, CC Dkt. No. 01-338, FCC 03-36 ¶¶ 7, 273 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

Nevertheless, a different section of the *Order* does construe section 271 of the Act to impose unbundling obligations that are independent of those under section 251 and that continue to apply when particular elements do not meet the unbundling standard under section 251. In discussing the relationship between sections 251 and 271, the *Order* did not even mention broadband issues, much less suggest that the Commission had made an affirmative determination that broadband facilities should be subject to a continuing unbundling obligation that the Commission has rightly found would thwart "incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings[.]" *Triennial Review Order* ¶ 290.

The Commission should act promptly to remove the present uncertainty on this issue by forbearing from any stand-alone obligation under section 271 to provide unbundled access to broadband elements. Indeed, imposing unbundling obligations under section 271 would have the same negative effects on broadband deployment that the Commission correctly concluded would result from an unbundling requirement under section 251. For example, construing section 271 to require unbundled access to loops, switching and transport would require a significant redesign of integrated fiber network architectures to create new and artificial points of access to individual components of the network architecture. Likewise, it would require the design and development of costly new systems to manage access at these new access points and development of new operations practices to correspond. Experience also has shown that any unbundling obligation evolves over time as it is further defined and interpreted, which would add yet another new layer of uncertainty and financial risk that would only add to the cost and

delay associated with the need to redesign the network and accompanying systems. And, of course, these costs, risks, uncertainties and delays would apply solely to the Bell companies—and not to their cable competitors that currently dominate the broadband market. Forbearance is especially appropriate with respect to broadband facilities because the Commission has already established the complete legal and factual predicate that warrants forbearance.

First, the *Triennial Review Order* finds that mandated unbundling of new broadband elements disserves the public interest by thwarting the incentives of ILECs and CLECs alike to incur the enormous fixed costs of deploying next-generation networks. That finding is more than enough to show, for purposes of section 10(a)(1)-(3), that such regulation is "not necessary" and that "forbearance . . . is consistent with the public interest." 47 U.S.C. § 160(a)(1)-(3). Section 706(a) provides still further support by singling out broadband for special attention and by "direct[ing] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, ¶ 69 (1998) ("*Advanced Services Order*").

Second, section 10(d) expressly authorizes forbearance from section 271's requirements where "those requirements have been fully implemented," 47 U.S.C. § 160(d), and the Commission has already found, in approving section 271 applications for 49 states and the District of Columbia, that the Bell companies have in fact "fully implemented the competitive checklist." 47 U.S.C. § 271(d)(3)(A)(i). A phrase is presumed to mean the same thing when it appears in two different provisions of a

statute—particularly where, as here, one of those provisions (section 10(b)) explicitly cross-references the other (section 271). The Commission's determination that the checklist has been "fully implemented" for purposes of section 271 thus necessarily meets the requirement under section 10(d) that the checklist be "fully implemented" before forbearing from those same checklist requirements.

This does *not* mean that the Bell companies are now free to ignore whatever checklist provisions they please. But it does mean that *the Commission* has authority to forbear where it finds that section 10's forbearance standard is met, and that it can and should forbear from particular checklist requirements to the extent they do more harm than good. Forbearance as to *broadband* elements is particularly appropriate, both (i) because the enormous fixed costs of investing in a next-generation network present the most compelling need for deregulatory certainty and (ii) because the purpose of section 271 is to require the Bell companies to open their historical legacy voice networks and markets to competition, not to regulate their investments in the advanced technology they need to compete in the broadband markets that *other* firms dominate.

Finally, forbearance is all the more appropriate here because, as this Commission has recognized in prior section 271 orders, checklist items 4 through 6 are, in any event, reasonably construed not to require the unbundling of broadband loop or switching elements excluded from the section 251 unbundling list. That is why, for example, the Commission granted several section 271 applications over objections that the Bell companies should have provided greater access to the packet switching element than was required by the Commission's section 251 rules.

In any event, the Commission can and should eliminate any continuing uncertainty on this score by granting Verizon's petition to forbear from any separate unbundling requirement that may apply to the broadband facilities that the Commission has concluded need not be unbundled under section 251.

ARGUMENT

I. The Commission Should Forbear From Any Stand-Alone Unbundling Obligation That Section 271 Might Be Construed To Impose For Broadband Elements.

A. If the *Triennial Review Order* makes one point clear, it is the importance of freeing the ILECs from any unbundling requirement that would dampen "incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings[.]" *Triennial Review Order* ¶ 290. As the Commission found, "excessive network unbundling requirements tend to undermine the incentives of *both* incumbent LECs *and* new entrants to invest in new facilities and deploy new technology." *Id.* ¶ 3 (emphasis added).

As an initial matter, "incumbent LECs are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent to such large scale capital investment." *Id.* Accordingly, "relieving incumbent LECs from unbundling requirements for those networks will promote investment in, and the deployment of, next-generation networks." *Id.*, ¶ 272. In addition, elimination of such unbundling requirements is also necessary to give CLECs incentives of their own to invest in advanced network technologies. This it true because, "with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis,

competitive LECs will need to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market." *Id.* As the Commission correctly concluded, "[t]he end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services". *Id.*

Accordingly, the *Triennial Review Order* "eliminate[s] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.*, ¶ 4. In their separate statements, all three members of the Commission majority stressed the centrality of that policy judgment to the *Order* as a whole and to the future of the industry.[2]

That policy judgment provides the predicate for forbearing from any stand-alone obligation under section 271 to unbundle broadband elements that the Commission has exempted from unbundling requirements under section 251. Imposing such obligations through the back door of section 271 (particularly after section 271 authorization has been granted) is just as inimical to the prospects for long-term competition as imposing those same obligations through the front door of section 251. Moreover, the

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[2] *See, e.g.*, Press Statement of Commissioner Abernathy at 1 (Feb. 20, 2003) ("I strongly support the Commission's decision to exempt new broadband investment from unbundling obligations"); Press Statement of Commissioner Martin at 1 (Feb. 20, 2003) ("[t]he action we take today provides sweeping regulatory relief for broadband and new investments," including "unbundling requirements on all newly deployed fiber to the home"); Response of Commissioner Martin to Questions from Rep. Eshoo at 1 ("The Order freed incumbent LECs from unbundling requirements on next-generation facilities and equipment like FTTH and equipment used to provide packet switching services"); Response of Chairman Powell to Questions for the Record at 9 ("The Commission's *Order* relieves incumbent local exchange carriers ('ILECs') from unbundling requirements on next-generation facilities and equipment like fiber-to-the-home ('FTTH') and equipment used to provide packet-based services").

consequences of unwarranted unbundling are especially pernicious in the broadband context, where, as discussed below, ILECs need the greatest assurance of a stable deregulatory environment to justify the massive fixed investments required for a next-generation network. And, although the *Triennial Review Order* discusses the relationship between sections 251 and 271 at some length, *see* ¶¶ 649-67, nowhere does it mention broadband at all, let alone confront the special need to protect broadband investment incentives from any unbundling obligations that might persist under section 271 even after the Commission has sought to end them, as anti-consumer, under section 251.

The acute need to confront that issue head-on arises not just from sound policy considerations, but from a specific statutory mandate. In section 706(a), Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment." For the most part, the *Triennial Review Order* recognizes the appropriately central role that section 706 should play in any unbundling decision affecting broadband elements. As the Commission found, the application of unbundling obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, *in direct opposition to the express statutory goals authorized in section 706.*" *Triennial Review Order* ¶ 288 (emphasis added).

But section 706(a) requires the Commission to employ all of the statutory tools at its disposal, and not just the "impairment" standard of section 251(d)(2), to "encourage deployment of advanced telecommunications capability" (*id.* ¶ 290). In particular,

although the Commission has declined to view section 706 as an independent source of forbearance authority, it has nonetheless made clear that the mandate of section 706 to promote broadband investment through "regulatory forbearance" weighs heavily in favor of forbearing under section 10 from unnecessary *broadband* regulation. *Advanced Services Order*, ¶ 69 ("section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services").

Section 706(a) all but compels forbearance from any stand-alone 271 unbundling obligations in this context, because (i) it singles out *broadband* facilities for special protection from excessive regulation, and (ii) the Commission has *already determined* under section 251(d)(2) that compelled unbundling of these facilities would do little to advance, and much to undermine, the roll-out of broadband services. For that matter, the standards of section 10(a) would be met even without the extra statutory guidance of section 706. The Commission eliminated broadband obligations on the grounds that such obligations would be both *unnecessary* (because ILECs generally are running well behind other carriers in the broadband rollout) and affirmatively *harmful* (because overzealous regulation would thwart the incentives of ILECs and CLECs alike to invest in broadband infrastructure). Those determinations are equivalent to the three core findings required for forbearance under section 10(a): continued unbundling is unnecessary for the protection of either consumers or other carriers (47 U.S.C. § 160(a)(1), (2)), and forbearance is plainly in the public interest (47 U.S.C. § 160(a)(3)). And, as discussed below, section 10(d), which conditions forbearance on a finding that section 271 has been

"fully implemented," poses no obstacle to forbearance from competitively harmful over regulation of next-generation broadband facilities.

Indeed, it is difficult to conceive of any circumstance in which sections 10 and 706 more forcefully support relief from unwarranted regulation. The D.C. Circuit has made clear that section 251(d)(2) embodies a congressional policy judgment that "unbundling is not an unqualified good" and that it often hurts, rather than helps, the cause of genuine long-term competition. *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). Although any unbundling obligation can impose significant "cost[s], including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource," *id.*, those costs are a matter of greatest concern where next-generation technology is at issue. That is the context in which the fixed costs of "research and development" are particularly enormous, and where the "tangled management" challenges of hammering out the details of the "shared use of a common resource" would be most vexing.

It is no answer to say that unbundling obligations arising solely from section 271 will be somewhat less onerous than those arising under section 251. On the contrary, imposing an unbundling obligation under section 271 would merely recreate the same investment disincentives the Commission sought to eliminate. This is so for several reasons.

First, any obligation to provide access separately to the various components of an integrated broadband network architecture necessarily would impose significant redesign requirements, result in suboptimal technology, and add cost, inefficiency and delay that deters deployment of these already risky new technologies in the first place. Although it

has been efficient to compartmentalize legacy circuit-switched networks into highly distinct "loop," "switching," and "transport" elements, the same is often not true of next-generation packet-switched networks. For example, an analog unbundled loop has a dedicated path or channel that can be routed directly to a CLEC's collocated facility. In a broadband system, the efficiency of the packetized technology derives in part from the fact that the packets from various end users flow over virtual channels, undifferentiated until they reach the destination packet switch. Consequently, imposing an obligation to provide access to individual components of a next-generation network architecture would require a costly redesign of the network to create access points for those various components. For example, in order to provide an unbundled loop that is directed to a competitor's facilities, Verizon would have to redesign the network and insert additional equipment in the local office that is capable of performing an intermediate packet-switching function and direct the packets to another carrier. Likewise, efficiencies in packet switching are often created, not by having a single switching unit in the local office that can be simply unbundled from the rest of the network, but rather by using a softswitch, where many features (which formerly existed in the switch) actually reside in remote computer-like servers that are distributed across the network. To have a single device that could serve as an "unbundled" switching element, the incumbent would have to redesign the network and eliminate many of the inherent efficiencies that help drive broadband deployment.

Second, there obviously is much more to the deployment of next generation networks than laying fiber or deploying packet switches, though those are obviously enormous tasks standing alone. One particularly critical aspect is the development and

deployment of the new systems necessary to operate these new networks. These systems are critical to provide services as efficiently and at as high a quality as possible to benefit customers, and also are one of the major cost components of deploying these new networks. Imposing an unbundling obligation under section 271 obviously would require the design and development of still new systems to cope with the complex requirements of unbundled access to piece parts of next-generation technology—with all the attendant costs of "the tangled management inherent in shared use of a common resource." 290 F.3d at 429. If unbundling were required, these systems would have to provision, track, bill, accept orders, and provide maintenance access for multiple providers using these various individual broadband elements. Verizon alone already has spent hundreds of millions of dollars in modifying existing OSSs to handle unbundling requirements for narrowband network elements. For broadband, the requirements would both increase the costs of new systems and reduce their benefit by sacrificing efficiency and quality, all of which further undermines the incentives to deploy.

Third, experience has proven that unbundling obligations evolve over time as they are further defined and interpreted. Indeed, in the case of both narrowband and broadband facilities, ILECs have been subject to a constantly shifting range of requirements implementing the section 251 unbundling requirements, and there is no reason to believe that any section 271 obligations would be different in this respect. These changing requirements add still further costs and complexities as ILECs are forced to modify both their underlying networks and the accompanying network operations and support systems to comply. Transferring this experience to broadband would add yet another layer of uncertainty and financial risk that would undermine deployment.

Fourth, although the Commission clarified in the *Triennial Review Order* that the TELRIC rules do not apply to elements unbundled under section 271 alone, the potential for intrusive regulatory involvement in the pricing of these elements remains. Indeed, parties have already argued to state regulators that they have a right to oversee these federal obligations. *See* Summary of TRIP Triennial Review Meeting Discussions, Washington, D.C. at 2 (Oct. 10, 2003), available at http://www.naruc.org/programs/trip/summaryoct03.pdf ("CLECs say states do have a role" in "setting prices under §§ 201 and 202 for UNEs required under § 271"). While that argument is misplaced because any remaining obligation under section 271 is a purely federal requirement, it nonetheless makes clear the pricing of any elements under section 271 will remain the subject of additional rounds of investment-deterring litigation. Moreover, even under a purely federal standard, there is significant uncertainty as to how the pricing obligation would be applied. While the Commission has made clear that negotiated, market-based rates will satisfy the section 201 pricing standard, experience has shown that other parties will nonetheless try to game the regulatory process, either to pre-empt the negotiations entirely or to obtain extra leverage. And that is all the more true given their past experience, even under section 201 pricing standards. *See, e.g., Verizon Telephone Companies Tariff FCC Nos. 1 & 11, Transmittal No. 232 (PARTS)*, 17 FCC Rcd 23598, • •8 (2002) (requiring Verizon to offer proof why it should not have a "UNE pricing methodology" imposed on a broadband service being evaluated under a section 201 standard). In short, the prospect of rate regulation even under sections 201 and 202 pricing standards will generate substantial

uncertainty and further pointless litigation so long as the underlying unbundling obligations remain in place.

B. Section 10(d) is no barrier to forbearance because that provision expressly authorizes forbearance from "the requirements of section . . . 271" where "those requirements have been fully implemented." 47 U.S.C. § 160(d). Here, the Commission has already made that very finding. The "requirements" at issue are those of the competitive checklist. The Commission can grant section 271 authorization—as it has now done for 49 states and the District of Columbia—only after expressly determining that a Bell company has in fact "*fully implemented* the competitive checklist" 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added). It is not mere coincidence that Congress used the exact same term in both section 10(d) and section 271 to describe the conditions for deregulatory relief. The "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). There is no getting around that rule here, since section 10(d) not only coexists in the same legislative enactment as section 271, but explicitly *cross-references* section 271 in the very forbearance limitation at issue. It is inconceivable that Congress used the same language to mean two contrary things in these two interrelated sections of the 1996 Act.

This is *not* to say that the Bell companies are free to ignore all of the checklist requirements the minute they receive section 271 authorization in a given state. Those requirements remain in effect until the Commission exercises its forbearance authority, which it may do where (as here) the "public interest" and the other forbearance standards

of section 10(a)(1)-(3) are met. And so long as particular requirements remain in effect, the Commission obviously retains authority to enforce those requirements. 47 U.S.C. § 271(d)(6). But the grant of a section 271 application does remove any hurdle that section 10(d) might pose to the *Commission's* authority under section 10(a) to forbear from any separate obligation to unbundled broadband facilities under section 271.

It is particularly appropriate to exercise that authority to forbear from any stand-alone broadband unbundling obligations under section 271—not just because (as discussed) unnecessary unbundling obligations are particularly counterproductive in the broadband context, but also because the section 271 checklist was never designed to interfere with the Bell companies' deployment of next-generation packet-switched networks. Instead, as discussed below, the checklist was designed to open up the local market by requiring the Bell companies to provide access to elements of the legacy circuit-switched networks, prior to entering the long distance business, a concern that does even not arise here. Again, if there were any doubt on either score, section 706 would resolve it by compelling an interpretation of section 10 that "encourage[s] the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance."[3]

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[3] AT&T recently espoused a new rationale for opposing forbearance from any aspect of section 271: the notion that any separate obligation under the section 271 checklist cannot be "fully implemented" until after the separate affiliate obligations of section 272 have sunset. That argument is misplaced, because section 272 is designed to safeguard competition in local markets *after* they have been opened and *after* the Commission has determined, under section 271(d)(3)(A)(i), that the substantive marketing-opening provisions of the checklist have themselves been "fully implemented." Section 272 does not *itself* "implement" those provisions; indeed, if it did, section 271(d)(3)(A)(i) could never be satisfied. In all events, any role that section 272 may play after a section 271 application is granted has no logical or legal bearing on

II. Granting Forbearance To Eliminate Uncertainty Is Especially Warranted Here Because Checklist Items 4-6 Should Not Be Read To Require The Unbundling Of Broadband Elements In The First Place.

Forbearance is all the more appropriate here because any separate obligation which may exist under section 271 is properly read to not extend to the broadband elements of the network, and forbearance will remove any doubt on that score.

A. Both the Commission and the courts have recognized that each checklist item draws its content from the evolving nature of the Commission's local competition rules at any given time. As the Commission has explained, "[o]ur rules vary with time, redefining the statutory obligations that govern the market. Just as our long-standing approach to the procedural framework for section 271 applications focuses our factual inquiry on a BOC's performance at the time of its application, so too may we fix at that same point the local competition obligations against which the BOC's performance is generally measured for purposes of deciding whether to grant the application." *Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 27 (2000) ("*Texas 271 Order*"); *see also AT&T Corp. v. FCC*, 220 F.3d 607, 628-32 (D.C. Cir. 2000).

The precise substance of these checklist obligations is largely derivative of the underlying section 251 obligations precisely because, standing alone, they contain very little determinate content. For example, checklist item 4 requires a Bell company to

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any unbundling obligations the checklist imposes, much less the *broadband* unbundling obligations at issue here.

provide "[l]ocal loop transmission" as a precondition to obtaining section 271 authorization, but it does not specify the manner in which the Bell company may discharge that obligation. Thus, in addressing claims that the ineffective provisioning of DSL loops amounts to a more general failure to meet loop provisioning obligations, the D.C. Circuit has observed that "[s]ection 271 does not say that an applicant must show that it provides nondiscriminatory access to *each category* of loop or to *every single* loop." *AT&T Corp.*, 220 F.3d at 624 (emphasis added). Instead, the court observed, it is "reasonably interpreted . . . to allow assessment of an applicant's *overall* provisioning of loops."[4] Checklist item 4 has never been understood—and could not sensibly be understood—to require a Bell company to provide CLECs with any requested form of "transmission" over every facility in its network that could qualify as a "loop."

Similarly, checklist item 6 does not require a Bell company to provide access to every *switch* in its network. Indeed, the Commission has rejected arguments in section 271 proceedings that the Bell company applicants have somehow violated checklist item 6 because they have denied access to their packet switching facilities. In each case, the Commission reasoned that a CLEC's rights of access to the packet switching element under checklist item 6 are limited to the very narrow circumstances in which, in the *UNE Remand Order*, the Commission required all ILECs to make that element available for purposes of sections 251(c)(3) and 251(d)(2). For example, in the *Texas 271 Order*, the

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[4] *Id.* (emphasis added); *see also Texas 271 Order*, at ¶¶ 28-33 (tying scope of section 271 unbundling obligations to effective date of new section 251 unbundling obligations under the *UNE Remand Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4080 ¶ 236 & n.756 (1999), *aff'd sub nom AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Commission rejected AT&T's complaints about denial of access to SWBT's splitters on the ground that, insofar as a splitter is "part of the packet switching element[,] . . . we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element."[5]

In sum, although the checklist does require access to "local loop transmission" and "local switching," the Commission has always judged satisfaction of those requirements at an appropriately high level of generality. And, as the cited examples reveal, the Commission has repeatedly construed these checklist items *not* to require access to *broadband-related* categories of the loop and switching elements except where the Commission has independently "exercise[d] [its] rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access." *Texas 271 Order* at ¶ 327.

B. A review of section 271's basic objectives confirms the same conclusion. In opposing Verizon's pending forbearance petition, AT&T itself argues that checklist

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[5] *Texas 271 Order* at ¶ 327; *accord Application by Qwest Communications Int'l, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado et al.*, 17 FCC Rcd 26303, ¶ 358 (2002) (rejecting AT&T's challenge under checklist item 6 on the ground, among others, that "Qwest offers competitive LECs unbundled packet switching in a nondiscriminatory manner when the conditions established by the Commission in the *UNE Remand Order* are met"); *Application of Verizon New England Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, Appx. B., ¶ 1 (2001) ("[t]o satisfy its obligations under this subsection, an applicant must demonstrate compliance with the Commission rules effective as of the date of the application relating to unbundled local switching . . . . In the *UNE Remand Order*, the Commission required that incumbent LECs need not provide access on an unbundled basis to packet switching except in certain limited circumstances."); *Joint Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, ¶ 105 (2001) ("To the extent that AT&T and WorldCom in fact seek to expand SWBT's obligations to unbundle packet switching, this issue is the subject of proceedings currently pending before the Commission").

items 4-6 independently "establish[] a 'safety net'" that, unlike section 251(c), "requires only access to a specific core group of elements." AT&T Opposition, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Dkt. No. 01-338, at 6 (filed Sept. 3, 2002). That safety net is needed, AT&T says, to deal with the "enormous monopoly power that the [BOCs] had accumulated over their local markets during the preceding several decades." AT&T Reply, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Dkt. No. 01-338, at 3 (filed Sept. 18, 2002). But that could be a rationale for retaining (if anything) only those section 271 unbundling obligations that relate to "core" *legacy* elements. It cannot remotely justify retaining any stand-alone obligation under section 271 to unbundle *broadband* elements.

AT&T suggests that the basic purpose of section 271 is to preclude the BOCs from leveraging their traditional dominance in local exchange markets to obtain an undue advantage in the long distance market. The chosen means was to force "the BOCs to open their local markets to competition before allowing them to enter the long distance services market in-region, because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power." *BellSouth Corp. v. FCC*, 162 F.3d 678, 689-90 (D.C. Cir 1998). Such market-leveraging concerns do not even arise with respect to *new* elements that are used in the provision of the *broadband* services at issue here because, among other considerations, the Bell companies are not remotely dominant in the market for those services.

To begin with, it is the cable companies that currently dominate the separate market for broadband services, and ILECs are the insurgent competitors deploying new

facilities to challenge the dominant incumbents. But even beyond this key fact, as the Commission explained in the *Triennial Review Order* (at ¶ 278), CLECs are just as capable as the BOCs of building new fiber facilities out to customer locations—and, in fact, "are leading in the deployment of FTTH." To take another example, CLECs cannot claim to have suffered any anticompetitive disadvantage from denial of access to the new packetized capabilities of "hybrid" loops, particularly if they retain general access to existing copper subloops or legacy TDM transmission capabilities. *Id.* ¶¶ 285-97. More generally, new broadband elements are not remotely part of any "specific core group of elements" to which Congress could have wanted to guarantee CLECs access in the interests of fair long distance competition.

In short, the statutory language of checklist items 4 through 6 is properly read not to impose unbundling obligations for broadband facilities that the Commission has removed from the scope of section 251 unbundling obligations. At a minimum, the Commission has very broad discretion to adopt that construction as a means of reconciling sections 251, 271, and 706.

In order to remove any doubt on that score, however, the Commission should promptly forbear from any stand-alone unbundling obligations for broadband elements to the extent that section 271 is ultimately construed to contain them so that ILECs can get on with the business of designing and deploying next generation broadband networks in a rational and efficient matter. As the Commission itself previously found, consumers will be the ultimate beneficiaries.

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WILMER, CUTLER & PICKERING
2445 M STREET, N W
WASHINGTON, DC 20037-1420

TELEPHONE +1 (202) 663 6000
FACSIMILE +1 (202) 663 6363
WWW WILMER COM

JONATHAN NUECHTERLEIN
(202) 663-6850
JON NUECHTERLEIN@WILMER COM

399 PARK AVENUE
NEW YORK NY 10022 4697
TELEPHONE +1 (212) 230 8800
FACSIMILE +1 (212) 230 8888

100 LIGHT STREET
BALTIMORE MD 21202 1036
TELEPHONE +1 (410) 986 2800
FACSIMILE +1 (410) 986 2828

1600 TYSONS BOULEVARD
10TH FLOOR
TYSONS CORNER VA 22102 4859
TELEPHONE +1 (703) 251 9700
FACSIMILE +1 (703) 251 9797

4 CARLTON GARDENS
LONDON SW1Y5AA ENGLAND
TELEPHONE +44 (0) 20 7872 1000
FACSIMILE +44 (0) 20 7839 3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS BELGIUM
TELEPHONE +32 (0)2 285 49 00
FACSIMILE +32 (0)2 285 49 49

FRIEDRICHSTRASSE 95
D 10117 BERLIN GERMANY
TELEPHONE +49 (30) 20 22 6400
FACSIMILE +49 (30) 20 22 6500

November 26, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition for Forbearance of the Verizon Telephone Companies, CC Docket No. 01-338

Dear Ms. Dortch:

On behalf of the Verizon Telephone Companies ("Verizon") please find attached an original and four copies of the Reply Comments of Verizon to be filed in the above-referenced proceeding.

Should there be any questions, please contact me at 202.663.6850.

Respectfully submitted,

Jonathan E. Nuechterlein

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon Telephone Companies	)	CC Docket No. 01-338
	)	

REPLY COMMENTS OF VERIZON

Michael E. Glover
Edward Shakin
VERIZON
1515 N. Courthouse Rd., Suite 500
Arlington, VA 22201
(703) 351-3099

Jonathan E. Nuechterlein
Samir C. Jain
Kathryn A. Reilly
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000

Counsel for the Verizon Telephone Companies

November 26, 2003

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REPLY COMMENTS OF VERIZON

Introduction and Summary

This proceeding presents issues of extreme urgency. Verizon is poised to begin deployment of fiber-to-the-premises facilities in early 2004, and it has already signed agreements with equipment suppliers and contractors. It has done so in the expectation that the Commission will align its rules with its policy against subjecting broadband elements to unbundling obligations. The Commission should thus immediately resolve the issues presented by this "new" forbearance petition, which in fact have been pending for more than a year.[1]

In the *Triennial Review Order*, the Commission recognized that it could not apply section 251 unbundling obligations to certain broadband-specific elements, explaining that the broadband market is already subject to intense intermodal competition, that competitive local exchange carriers ("CLECs") can and do offer broadband services without access to those

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[1] In its Public Notice, "Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271," CC Docket No. 01-338, FCC 03-263 (rel Oct. 27, 2003), the Commission denied Verizon's original July 2002 forbearance petition and treated Verizon's October 24, 2003 *ex parte* as a new petition for forbearance. Verizon has separately appealed the Commission's denial of the original petition as an evasion of the 12-15 month statutory deadline set forth in 47 U.S.C. § 160(c). *See Verizon Tel. Cos. v. FCC*, No. 03-1396 (D.C. Cir. filed Nov. 5, 2003).

elements, and that unbundling obligations are inimical to the prospects for further broadband investment. Such obligations, no matter what their statutory provenance, would thus thwart the Commission's goal under section 706 of ensuring a wireline broadband alternative to cable modem service, which increasingly occupies "a leading position in the [broadband] marketplace."[2] As Verizon explained in its October 24 *ex parte*, the *Triennial Review Order* establishes the complete predicate for forbearance from any residual unbundling obligation that might otherwise be found to apply to such elements under a wooden application of section 271.[3] A finding that such obligations persist under section 271 after they have been eliminated as anti-investment and anti-consumer under section 251 is a *reason to grant* forbearance from those obligations under all three criteria of section 10(a). It is not, as several CLECs here submit, a coherent basis for reflexively preserving whatever obligations section 271 is thought to impose in the *absence* of forbearance.

Much of the opposition to Verizon's forbearance request thus reduces to the claim that the Commission did not really mean what it said when it took these elements off the table under section 251. Specifically, in attacking the basis for forbearance under section 10(a), the opponents manage only to quarrel with the Commission's twin policy findings that compelled unbundling of broadband-specific elements is both unnecessary for competition and affirmatively harmful to the public interest in the development of alternatives to cable modem service.

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2 Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, FCC 03-36 ¶ 292 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

3 *See* Letter from Susanne A. Guyer, Verizon, to Chairman Powell and the Commissioners, FCC, CC Docket No. 01-338 at 3, 6 (filed Oct. 24, 2003) ("October 24 *ex parte*").

There is likewise no merit to the opponents' claim that this forbearance petition is somehow at odds with Verizon's underlying advocacy in the *Triennial Review* proceeding. Verizon and other ILECs there observed that they will have strong incentives to recoup their massive capital expenditures by keeping as much broadband traffic as possible on their networks by providing wholesale as well as retail broadband services on commercially reasonable, negotiated terms. The opponents of forbearance now ask why Verizon would seek to avoid *unbundling obligations* for broadband elements, governed by the standards of section 201. *See Triennial Review Order* ¶ 253. The straightforward answer is that, as Verizon has previously explained at length, voluntarily negotiated wholesale service offerings are fundamentally different from unbundling requirements because, among other things, the latter would require major alterations in an ILEC's systems and network architecture, and it would inject additional costs, complexities and regulatory uncertainty into an already risky undertaking. All of this, which is simply ignored by the CLECs, would serve only to delay or deter widespread deployment of broadband.

In turning from policy to law, the opponents of forbearance skate from thin ice into open water. First, there is no substance to the opponents' arguments about section 10(d). Although they suggest otherwise, Congress conditioned forbearance from given "requirements of . . . section 271" on a showing that "*those* requirements"—not *all* section 271 requirements—"have been fully implemented." 47 U.S.C. § 160(d) (emphasis added). Thus, when a Bell company seeks forbearance from particular checklist requirements, the question is whether *those checklist* requirements have been fully implemented. And the answer is necessarily yes if the Commission has found, as the express prerequisite to granting a section 271 application, that the Bell company "has fully implemented the competitive checklist." 47 U.S.C. § 271(d)(3)(A)(i). That

is presumably one reason why the Commission took pains in its recent *OI&M Forbearance Order* to stress that its analysis there of section 10(d) addressed only "whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does *not* address whether any other part of section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[4]

The CLECs do not deny that the "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). That normal rule is all but compulsory where, as here, the use of identical language cannot be coincidental because one provision (section 10(d)) explicitly cross-references the other (section 271). In response, the CLECs rely on cases in which (i) there was no similarly obvious statutory cross-reference and thus no guarantee against mere coincidence *and* (ii) application of the same-meaning rule would produce "an absurd result" or would otherwise thwart the statutory scheme. *Cellular Telecomm. & Internet Ass'n v. FCC*, 330 F.3d 502, 511 (D.C. Cir. 2003). Here, construing the term "fully implemented" as having the same meaning in sections 10 and 271 would produce not an absurd result, but an eminently sensible one, because it would enhance the Commission's authority to act in what it determines to be the public interest. In particular, construing the term "fully implemented" identically in these two provisions would remove (with

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[4] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, FCC 03-271 ¶ 6 (rel. Nov. 4, 2003) ("*OI&M Forbearance Order*") (emphasis added). Verizon disagrees with the Commission's basis for denying forbearance in that proceeding, but it nonetheless agrees with the Commission's finding that its decision has no bearing on the circumstances in which forbearance from checklist requirements is appropriate.

the grant of a section 271 application) any section 10(d) barrier to the Commission's authority to decide for itself whether forbearance from checklist requirements meets the independent standards of section 10(a).

The CLECs' next claim is that section 271(d)(4), which precludes the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist," trumps the Commission's forbearance authority under section 10. This too is nonsense. Section 10 not only grants the Commission broad authority to forbear from applying "*any* provision" of the Communications Act, 47 U.S.C. § 10(a) (emphasis added), but also cross-references section 271 explicitly and specifies the circumstances in which forbearance from "the requirements . . . of section 271" is appropriate, 47 U.S.C. § 160(d). Section 271(d)(4) addresses the checklist showing required to obtain long distance authority and makes clear that the showing cannot be enlarged (or diminished) by the Commission. Once the required showing has been made, however, that provision is satisfied. Section 271(d)(4) says nothing whatsoever about the Commission's authority to *forbear* once the required showing has been made. Indeed, at that point (as addressed further below), the checklist requirements have been "fully implemented" by the express terms of section 271, and the Commission is expressly authorized to forbear by the terms of section 10(d). This reading places sections 10 and 271(d)(4) in harmony; the CLECs' contrary reading would place them in needless contradiction.

Finally, any doubt on these or other issues would be resolved by section 706 of the 1996 Act, which "direct[s] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced

services."[5] The CLECs have no meaningful response to this point. Although obscure, their argument appears to be that (i) section 706 can affect the section 251 unbundling inquiry only because section 251(d)(2) contains an "at a minimum" clause that permits consideration of issues other than "impairment," (ii) section 271 contains no such clause, and (iii) section 706 is therefore irrelevant to any construction of section 271. This argument would make no sense even if Verizon had invoked section 706 solely as a basis for interpreting section 271, but in fact Verizon invoked section 706 as a basis for, in the Commission's own words, "us[ing] . . . the *forbearance authority under section 10(a)* to encourage the deployment of advanced services." *Id.* (emphasis added). Section 706 plainly warrants a broad interpretation of the Commission's discretion to forbear from regulations that, in its view, preclude the development of broadband services.

Discussion

I. The Commission Should Forbear From Enforcing Any Stand-Alone Unbundling Obligation Arising From Section 271 With Respect To Broadband Elements.

The CLECs' arguments against forbearance fall into two general categories: (i) arguments that forbearance would violate the policy-oriented criteria of section 10(a), and (ii) arguments that forbearance would violate the legal prohibitions of section 10(d) or section 271(d)(4). None of these arguments has merit.

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5 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24044-45 ¶ 69 (1998) ("*Advanced Services Order*"), *aff'd in part, vacated on other grounds, GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

A. The Commission's Determinations In The Triennial Review Order Establish The Complete Basis For Forbearance Under Section 10(a).

A proper analysis of the section 10(a) criteria begins with an undisputed and judicially recognized industry reality: "The Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market."[6] Indeed, the Bell companies not only trail the cable companies in the market, but are falling farther behind them. "[M]ore consumers continue to obtain their high speed Internet access by cable modem service than by xDSL, and the rate of growth for cable modem subscribership continues to outpace the rate of growth for xDSL subscribership." *Triennial Review Order* ¶ 292. What Verizon seeks in this forbearance proceeding is the same stable environment, free of broadband unbundling obligations, that cable companies now enjoy.

In claiming that forbearance is nonetheless unwarranted under the substantive criteria of section 10(a), the CLECs make many arguments, but they all reduce to two basic claims: first, that CLECs need rights of access to broadband elements in order to compete and, second, that ILECs do *not* need assurances of a stable deregulatory environment before spending billions of dollars to upgrade their networks. The *Triennial Review Order* rejects each of those arguments. As an initial matter, as the Commission found, there is no basis for imposing an unbundling obligation in the broadband market given "the existence of a broadband service competitor with a leading position in the marketplace." *Triennial Review Order* ¶ 292. Indeed, it would be senseless to blunt the wireline challenge to the dominant cable modem providers by subjecting

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[6] *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom Inc. v. USTA*, 71 U.S.L.W. 3416 (U.S. Mar. 24, 2003) (No. 02-858).

the Bell companies alone to intrusive unbundling obligations. *See USTA*, 290 F.3d at 428-29 (vacating line-sharing rules because of prevalance of intermodal broadband competition).

Moreover, even apart from the dominance of cable competitors in the broadband market, the *Order* finds that "competitive LECs are *leading* the deployment of FTTH" without help from the ILECs. *Id.* ¶ 278 (emphasis added). As to the packetized functionality of copper-fiber hybrid loops, the *Order* flatly rejects the long-standing CLEC claim "that, without unbundled access to hybrid loops, competitive LECs will not be able to serve certain customers," and it "determine[s] that unbundled access to incumbent LEC copper subloops," combined with the "availability of TDM-based loops," is more than enough to "provide competitive LECs with a range of options for providing broadband capabilities." *Triennial Review Order* ¶ 291 & n.839; *see also id.* ¶ 295.

The *Order* also decisively finds that unbundling requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.* ¶ 3. It thus concludes that relief from broadband unbundling requirements is necessary to "promote investment in, and deployment of, next-generation networks," *id.* ¶ 272, because "incumbent LECs are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment," *id.* ¶ 3. Accordingly, the *Order* "eliminate[s] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.* ¶ 4.

Although the CLECs continue to disagree with them, these findings conclusively establish that the three criteria of section 10(a) are satisfied: *i.e.*, that continued unbundling is unnecessary to protect either consumers or competitors (47 U.S.C. § 160(a)(1), (2)), and that

forbearance is in the public interest (47 U.S.C. § 160(a)(3)). The Commission's finding that ILECs are falling further behind cable companies in the provision of broadband services, *id.* ¶ 292, together with its observation that the Commission's rules will "provide competitive LECs with a range of options for providing broadband capabilities," *Triennial Review Order* ¶ 291, conclusively answer any concern about whether any vestigial broadband unbundling obligation is needed to protect competitors for purposes of section 10(a)(1). *See also* pp. 14-15, *infra* (discussing Commission plans to regulate wholesale service offerings under section 201 and 202). And the remaining criteria are all satisfied for the simple reason that the Bell companies—the nation's best chance for a broadband alternative to the market-dominant cable modem providers—"are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Triennial Review Order* ¶ 3.[7] Indeed, continuing to enforce unbundling obligations against these second-tier players in the broadband market would perversely enhance the odds that cable companies will eventually monopolize that market completely.[8]

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[7] *See Triennial Review Order* ¶ 272 ("consumers will benefit from [the] race to build next generation networks and the increased competition in the delivery of broadband services"). The same is necessarily true of the section 10(b) mandate to consider whether forbearance will promote "competitive market conditions." 47 U.S.C. § 160(b).

[8] For similar reasons, there is no merit to AT&T's bizarre argument that Verizon should be forced to unbundle broadband and next-generation capabilities precisely because cable companies have no corresponding obligation to provide them to CLECs. The Commission has already found that CLECs are capable of building broadband facilities of their own, and in all events it would be arbitrary and capricious to subject a secondary player in a given market to greater regulatory burdens than the clear market leader on the theory that those burdens must be borne by *somebody*.

Some CLECs assert that, despite the dominance of cable companies in the broadband market, ILECs will continue to occupy a special status because cable companies are not widely providing *bundles* of voice and data services in light of their "slow entry into the voice market." Sprint Opp. at 16; *see also* AT&T Opp. at 30. This is untrue on three levels. First, the Commission has properly defined the relevant market, for purposes of assessing the need for any unbundling of broadband-specific elements, as the *broadband market*, *see, e.g., Triennial Review Order* ¶¶ 212-13, 292, and that market is indisputably subject to fierce competition, *id.* ¶ 292. Second, cable telephony is already available to more than 15 million U.S. homes—approximately 15 percent of the mass market[9]—and cable operators are adding tens of thousands of new subscribers each month.[10] And cable telephony will become even more widely available in the near future, as cable operators throughout the country have begun deploying commercial

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[9] Comcast Press Release, *Comcast Full Year and Fourth Quarter Results Meet or Exceed All Operating and Financial Goals* (Feb. 27, 2003); Cox Communications Press Release, *Cox Communications Announces Fourth Quarter Financial Results for 2002; Strong Demand for Cox's Digital Services Builds Solid Foundation for Continued Growth in 2003* (Feb. 12, 2003); Cablevision Systems Press Release, *Cablevision Systems Corporation Reports Fourth Quarter 2002 Financial Results* (Feb. 11, 2003); RCN Press Release, *RCN Announces Fourth Quarter and Year-End 2002 Results* (Mar. 13, 2003); Charter Press Release, *Charter Announces 2002 Operating Results and Restated Financial Results for 2001 and 2000; Company Will Extend Filing of Form 10-K* (Apr. 1, 2003); Insight Communications Press Release, *Insight Communications Announces Fourth Quarter and Year-End 2002 Results* (Feb. 25, 2003); Knology, Inc., Form 10-K (SEC filed Mar. 31, 2003).

[10] Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control of AT&T Corp. and Comcast Corp. at 11, *Applications for Consent to the Transfer of Control of Licenses Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, filed in MB Docket No. 02-70, May 21, 2002, at 11 ("AT&T Broadband is capable of serving approximately seven million households, has enrolled over 1.15 million cable telephony customers, and is adding approximately 40,000 customers per month.").

voice-over-IP services.[11] Investment analysts have pointed to cable companies' rollout of cable telephony as "the largest risk to Bell fundamentals over the next 5 years," noting that "the impact on margins is increasingly evident today."[12] Third, cable modem service can serve as a platform for high-quality voice applications *even if the cable provider itself does not provide them.* For example, anyone can plug a Vonage phone into a cable modem and instantly receive a substitute for wireline voice service. This development, combined with the increasing willingness of wireless customers to "cut the cord," makes it all the more necessary to free the Bell companies from anomalous regulatory burdens in this ruthlessly competitive landscape.[13]

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[11] *See* A. Breznick, *Major MSOs Prepare for Full-Scale Rollouts of VoIP Service*, Cable Datacom News (Nov. 2003) (noting that Time Warner Cable, Cablevision Systems, Cox Communications and Comcast Corp., as well as many small cable operators, have all either already introduced commercial voice-over-IP services or are lanuching "soft" market rollouts or large market trials); *see also* D. Willis, *Cable Calling*, Asbury Park Press (Nov. 23, 2003) available at http://www.app.com/app/story/0,21625,859803,00.html (Cablevision Systems now offers voice-over-IP services in New Jersey, New York, and Connecticut); "Cox Digitial Telephone," available at http://www.cox.com/telephone/Frequently%20Asked%20Questions.asp (visited on Nov. 26, 2003) (Over 350,000 customers have already switched to Cox's telephony service); *Time Warner Expands VoIP*, Broadband Reports.com (Sept. 1, 2003) (Time Warner plans to launch voice-over-IP services in North Carolina and New York, in addition to its current Maine offering, within the next few months).

[12] John Hodulik, *Cable Telephony Competition: Who Gets It?*, UBS Investment Research, at 1 (Aug. 7, 2003).

[13] *See* Alex Salkever, *Why the Bells Should Be Very Scared; Free Voice Calls Transmitted Over the Internet Are Fast Becoming Mainstream. To Survive, Today's Phone Companies Must Adjust, Radically*, Business Week Online (Nov. 11, 2003) ("twisted copper is on the verge of giving way to the Internet"); *ILECs 'Doomed' By Next-Generation Networks, Experts Say*, Communications Daily (Nov. 10, 2003) (quoting John McQuillan, co-chairman of Next Generation Networks: "U.S. ILECs are in mortal peril" due to voice-over-IP); Reinhardt Krause, *With Broadband, Bundling, SBC Aiming for Comeback*, Investor's Business Daily (Nov. 14, 2003) ("[t]he growth of VoIP, or voice over Internet protocol, is also [in addition to wireless] threatening the Bells."); *see also FCC Reports Wireless Sub Growth is Leveling, Mobile is on Rise*, Communications Daily (June 27, 2003) (estimating that wireless traffic has displaced 30 percent of total wireline minutes); Business Wire, *Consumers Abandon Landlines and Increase Mobile Call Volumes, Creating Strong Growth in the Wireless Market, Reports Yankee Group*

Although the CLECs argue otherwise (*e.g.*, AT&T Opp. at 18), application of a section 271 unbundling requirement to Verizon's broadband elements would create the same investment disincentives that the Commission intended to eliminate in the *Triennial Review Order*, even though the pricing of those elements would be governed by yet-to-be-determined standards under section 201 rather than TELRIC. As the D.C. Circuit has recognized, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA*, 290 F.3d at 427. These concerns are most pronounced in the case of next-generation packet-switched networks because, as Verizon explained in its October 24 *ex parte* (at 9-13), that is the context in which research and development costs are most forbidding and where "the tangled management inherent in shared use of a common resource," *USTA*, 290 F.3d at 429, is most problematic.

For example, in such a network, packets travel from various end users over virtual channels, undifferentiated until they reach the destination packet switch. There is no inherent need for an intermediate access point from which CLEC traffic may be redirected to the CLEC's switch. In fact, new packet-switched fiber networks are being built that are not designed to accommodate access by multiple carriers. Any unbundling requirement would thus require a costly redesign of the network, not only by Verizon but by its equipment suppliers as well, to create access points to perform an intermediate packet-switching function. And, as discussed in Verizon's October 24 *ex parte*, any such requirement would also require ILECs to develop and

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(Sept. 16, 2002) (predicting that, by 2006, U.S. mobile subscribers will increase by 50% and will "dominate personal calling and severely cannibalize landline minutes of use.").

implement expensive new systems to provision and track orders, send out bills, and provide maintenance access for the various providers using individual broadband elements.[14]

Unbundling obligations would further undermine investment incentives by subjecting Verizon to a shifting range of regulatory requirements. As demonstrated by Verizon's experience in the context of its section 251 obligations, any unbundling requirement evolves over time as it is interpreted and applied, and thus requires carriers to continually modify both their underlying networks and the accompanying network operations and support systems in order to comply with the changing regulations. Applying an unbundling obligation to broadband facilities would add another layer of uncertainty and financial risk that would depress the investment incentives of any rational business. An unbundling requirement also would subject Verizon to the threat of intrusive state regulation,[15] as well as investment-deterring litigation over the pricing of elements. Rather than addressing these realities, the CLECs venture the self-ridiculing argument that the existing regulatory uncertainty about broadband deployment "is solely the product of Verizon's unrelenting requests to be relieved of its unbundling obligations." MCI Opp. at 16.

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[14] MCI is wrong in asserting that Verizon's proposed Packet at the Remote Terminal Service ("PARTS") offering proves that ILECs could unbundle components of next-generation networks without such network redesign. The PARTS service was designed to provide access to xDSL service over legacy facilities and existing network architectures that already provide intermediate access points to CLECs. As such, it is irrelevant to the unique challenges presented by forced access to next-generation broadband networks.

[15] As noted in Verizon's October 24 *ex parte*, although the Commission clarified in the *Triennial Review Order* that the TELRIC rules do not apply to elements unbundled under section 271 alone, CLECs have already argued to state regulators that they have a right to oversee—*i.e.*, intrusively regulate—these federal obligations.

Equally disingenuous is the CLECs' claim that Verizon's request here is somehow inconsistent with Verizon's prediction in the *Triennial Review Proceeding* that, absent unbundling obligations, ILECs would still have every incentive to provide wholesale service offerings over their next-generation networks on negotiated, commercially reasonable terms. The CLECs point to a section of the *Order* in which the Commission acknowledged that LECs would likely make broadband service available on a wholesale basis:

> [W]e expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act

Triennial Review Order ¶ 253. But this statement, which refers to the ILECs' *voluntary* offering of wholesale services in the mutual interest of CLECs and ILECs alike, has no bearing on the issue of whether BOCs should be *compelled* to unbundle elements of their next-generation broadband networks. Because they face intense intermodal competition from the dominant cable modem platform, ILECs will need to find ways to keep traffic "on-net" to cover their enormous capital investments, including through the provision of wholesale service offering to independent service providers. As Verizon previously explained at length, the question here is a very different one: whether ILECs will have to unbundle elements of their new broadband networks subject to as-yet undefined and (if experience is any guide) constantly shifting regulatory prescriptions as to what must be unbundled and at what price, accompanied by "the tangled management inherent in shared use of a common resource." *USTA*, 290 F.3d at 429. The answer to that question should be a resounding no. As AT&T itself told the Commission scarcely three years ago, "fundamental economic truths" establish that "[n]egotiated agreements,

rather than government mandates, are the most appropriate means for creating and defining access relationships."[16] Those truths still apply.

Finally, any doubt on any of these issues should be resolved by the Commission's mandate under section 706(a) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment." In the *Advanced Services Order*, the Commission made clear that section 706 operates as a thumb on the deregulatory side of the balance when the Commission considers forbearing from unnecessary *broadband* regulation.[17] The CLECs contend that section 706 "is irrelevant to the scope of a BOC's access obligations under section 271," reasoning (i) that the Commission could consider section 706 in addressing section 251 unbundling obligations only by virtue of the "at a minimum" clause of section 251(d)(2) and (ii) that there is no such clause in section 271. AT&T Opp. at 19; *see also* MCI Opp. at 11; Z-Tel Opp. at 5. This makes no sense. Just as the *Triennial Review Order* makes clear that section 706 is relevant to the broadband unbundling analysis,[18] the *Advanced*

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[16] Comments of AT&T Corp., Notice of Inquiry, filed in GN Docket 00-185, Dec. 1, 2000 at 80. Whether these voluntary service offerings would be subject to traditional common carriage obligations is a separate question presented in the Commission's pending inquiry into wireline broadband obligations. *See* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3042 ¶ 51 (2002).

[17] *See Advanced Services Order*, 24045 ¶ 69 ("section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services").

[18] *See Triennial Review Order* ¶ 288 (broadband unbundling obligations would stand "in direct opposition to the express statutory goals authorized in section 706" because they would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities").

Services Order unequivocally declared that section 706 is relevant to the Commission's application of section 10, which is at least as subject to interpretation as section 251(d)(2). There is no plausible basis for second-guessing that determination here.

B. Neither Section 271(d)(4) Nor Section 10(d) Bars The Commission From Forbearing From Vestigial Checklist Obligations.

The CLECs argue that section 271(d)(4), which provides that the Commission may not "limit or extend the terms used in the competitive checklist," bars the Commission from forbearing here. That argument is untenable. Section 10 grants the Commission broad authority to forbear from applying "*any* provision of this [Act]." 47 U.S.C. § 10(a) (emphasis added). And section 10 specifically provides that the Commission must forbear from applying section 271 requirements if those requirements have been "fully implemented" and the three criteria set forth in subsection 10(a) are satisfied. Section 271(d)(4), in contrast, speaks to a different set of issues: the Commission's default authority to interpret the Communications Act flexibly in the *absence* of forbearance. Like many other such provisions throughout the Act, it does not remotely qualify the Commission's mandate to forbear when the standards of section 10 are met. Instead, it directs the Commission to ensure full implementation of the checklist before granting a section 271 application, at which point the checklist requirements are "fully implemented" for purposes of section 10(d) and are thus eligible for forbearance under section 10(a), as discussed below. This position places sections 10 and 271(d)(4) in harmony, whereas the CLECs' contrary position would place them in needless conflict. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal citations omitted). And, in all events, even if these two provisions were in conflict, section 10 would prevail as the more "specific" of the two on the issue presented here:

section 271(d)(4) does not even mention forbearance or section 10, whereas section 10 expressly refers to section 271 and governs the terms of the Commission's forbearance authority with respect to section 271 requirements.

Nor is there any merit to the CLECs' contention that section 10(d) precludes the Commission from granting forbearance once a section 271 application has been granted. Section 10(d) authorizes forbearance from "the requirements of section . . . 271" where "those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission has already expressly found that the requirements at issue here — those of the competitive checklist — have been "fully implemented," because that is an explicit statutory prerequisite to granting any section 271 application. 47 U.S.C. § 271(d)(3)(A)(i).

Unable to dispute that the "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning," *Lundy*, 516 U.S. at 250 (internal quotations omitted), the CLECs argue that the rule should be ignored here on the theory that application of the rule "would lead to an absurd result and ignore the differing purposes of the sections," AT&T Opp. at 15. But just the opposite is true. First, section 10 *cross-references* section 271 in the very subsection at issue, and it is inconceivable that Congress used the same language by accident to describe these interrelated bases for gaining deregulatory relief. Second, construing the language to mean the same thing in each provision would produce a perfectly sensible result, not an "absurd" one. It would remove, once a section 271 application is granted, an extraneous statutory obstacle to the Commission's freedom to exercise its own best judgment about whether forbearance is warranted or not under section 10(a).

It is thus nonsensical to claim, as AT&T does, that this construction of section 10(d) will produce "anticompetitive and counterintuitive results that run headlong against the goals of the

1996 Act." AT&T Opp. at 12. As Verizon made clear in its October 24 *ex parte* (and previously), there is no dispute that the competitive checklist requirements remain in effect after the Commission has granted section 271 authorization in a given state. The only question is whether, once such authorization has been granted, section 10 allows the Commission to forbear from applying particular checklist requirements if it determines that forbearance is in the public interest and otherwise meets the independent criteria of section 10(a). At bottom, AT&T is left with the unenviable argument that it is "absurd" to give this Commission greater discretion to remove requirements that harm the public interest.

Finally, both the statutory text and Commission precedent foreclose the CLECs' argument that section 10(d) prohibits the Commission from forbearing from *any* particular section 271 requirement until section 271 *as a whole* has been "fully implemented." *See* MCI Opp. at 17; AT&T Opp. at 15-16.[19] Section 10(d) itself makes clear that only "*those* requirements" from which the BOC is seeking forbearance must be "fully implemented" before the Commission is authorized to forbear. 47 U.S.C. § 160(d) (emphasis added). And the same conclusion follows from the Commission's recent *OI&M Forbearance Order.* There the Commission held that section 10(d) barred it from forbearing from applying section 272 requirements because those requirements—which the Commission found were incorporated by reference as requirements of section 271—had not been "fully implemented." *OI&M Forbearance Order* ¶ 5. The Commission noted, however, that "[its] analysis . . . applies only to

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[19] AT&T goes so far as to argue that the Commission lacks authority to forbear from a single requirement of section 251(c) *or* section 271 until every other such requirement has been satisfied, whether or not it bears any conceivable relationship to the requirement as to which forbearance is sought. As explained below, AT&T's nonsensical interpretation of section 10(d) directly contradicts the Commission's reasoning in the *OI&M Forbearance Order.*

whether section 271 is 'fully implemented' *with respect to the cross-referenced requirements of section 272*, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is 'fully implemented.'" *Id.* ¶ 6 (emphasis added). This passage confirms two things: first, that AT&T is quite wrong to rely on the *OI&M Forbearance Order* as support for its opposition to forbearance from checklist requirements (*see* AT&T Opp. 10-11) and, second, that the "fully implemented" language of section 10(d) applies on a granular basis to the specific requirements of section 271 from which a Bell company seeks forbearance.

II. Section 271 Should Not Be Read To Require The Unbundling Of Elements That (1) The Commission Has Removed From The Section 251 Unbundling List And (2) Are Specific To Broadband Markets In Which Bell Companies Trail Other Providers

In its October 24 *ex parte*, Verizon showed that forbearance is particularly appropriate in this context because any separate unbundling obligation that may exist under section 271 could properly be read not to extend to broadband, and because the statutory purposes behind section 271 are not implicated in the broadband context. Granting forbearance is the most straightforward way to remove any doubt on this score.

The CLEC response is long on rhetoric and short on substance, and it begins with a mischaracterization. In connection with this forbearance petition, Verizon is *not* arguing that an element is automatically exempt from unbundling under section 271 *either* if the Commission has excluded it from the section 251 list *or* if it relates to broadband services. Instead, for present purposes, Verizon is arguing that the Commission should forbear from any obligation that might otherwise apply if the Commission has excluded it from the section 251 list *and* it is specific to broadband services. And Verizon's additional point here is simply that forbearance is particularly appropriate both because there is a significant question as to whether any separate unbundling obligation under section 271 should be read to extend to broadband elements, and because the purpose underlying section 271 simply is not implicated in this context.

This makes abundant sense. As noted, "[t]he Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market," *USTA*, 290 F.3d at 429, and it would be irrational to read into section 271 a forced sharing obligation that the Commission has rightly declined to impose on these second-tier broadband providers under section 251, since section 271 is designed to address the Bell companies' traditional market power in the separate narrowband telephony market. It is no answer to say that, with respect to hybrid loops, the Bell companies would be making use of legacy facilities to provide broadband services. Rightly or wrongly, the *Triennial Review Order* preserves full CLEC access to the legacy functions of mass market ILEC loop facilities under section 251. The question here is whether section 271 should be construed to give CLECs access to the *non-legacy* packet-switched functionality of these loops, or to fiber-to-the-premises network elements, which "incumbent LECs have not widely deployed" and which, as the Commission has found, may *not* be deployed in an environment of regulatory uncertainty. *Id.* ¶ 290; *see also id.* ¶¶ 272, 295. Granting CLECs such access under section 271, when the Commission has rightly foreclosed it as both unnecessary and harmful under section 251, would make no legal or policy sense.

Indeed, the Commission has embraced precisely this point in several section 271 orders, which the CLECs labor in vain to distinguish. As explained in Verizon's October 24 *ex parte* (at 15-17), the Commission has repeatedly granted section 271 applications over CLEC objections that the Bell companies have violated checklist items 4 and 6 by failing to provide access to broadband-specific elements that the Commission has excluded from the section 251 list. The CLECs, however, try to explain away these precedents by contending that, in each case, the Commission was *really* deciding only that the Bell company had complied with checklist item 2,

which explicitly incorporates section 251 unbundling requirements by reference, rather than checklist items 4-6, the requirements at issue here. *See, e.g.*, MCI Comments at 27.

This is wrong on two levels. First, it misrepresents these section 271 orders even as a formal matter. For example, in the *Qwest 9-State Order*, the Commission upheld Qwest's denial of access to the packet switching element under *checklist item 6*, not checklist item 2, and it did so because the Commission had sharply limited any corresponding obligation to provide access to that element under section 251.[20] Likewise, in the *Texas 271* Order, the Commission rejected AT&T's complaint that denial of access to the splitter was a violation of *checklist item 4*, again because of prior determinations under section 251.[21] In all events, even if the Commission had addressed these issues under checklist item 2, which it did not, it would be inconceivable that the Commission and all interested CLECs could have simply overlooked an independent obligation to provide access to the same elements under these other checklist items. In sum, the CLECs cannot square their overbroad theory of section 271 unbundling obligations with Commission

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[20] Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, 26502-03 ¶¶ 370, 371 (2002) ("*Qwest 9-State Order*").

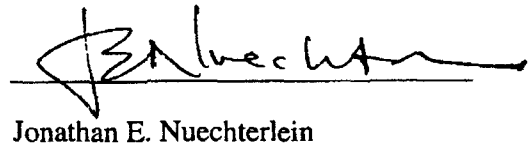
[21] Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwester Bell Communications Services, Inc. d/b/a Southwester Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18516-17 ¶ 327 (2000) ("*Texas 271 Order*"). Contrary to MCI's argument (at 27-28), this determination did *not* rest on a finding that the splitter was not an "element." Instead, the Commission viewed the splitter as a component either of the loop or of the packet-switching element, assumed *arguendo* that it is "part of the packet switching element," and found that the checklist imposes no obligation to unbundle it "because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element." *Id.*

precedent. That precedent is correct for the reasons stated in Verizon's October 24 *ex parte*, and it further reinforces the reasons that the Commission should grant the forbearance sought here.

Conclusion

For the reasons stated above, the Commission should forbear from applying any stand-alone section 271 unbundling requirement to Verizon's broadband elements.

Respectfully submitted,



Michael E. Glover
Edward Shakin
VERIZON
1515 N. Courthouse Rd., Suite 500
Arlington, VA 22201
(703) 351-3099

Jonathan E. Nuechterlein
Samir C. Jain
Kathryn A. Reilly
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000

Counsel for the Verizon Telephone Companies

November 26, 2003

CERTIFICATE OF SERVICE

I, Carole Walsh, do hereby certify that on this 26th day of November 2003, copies of the Reply Comments of Verizon were served upon the following parties by first class mail, postage pre-paid.

Andrew D. Lipman
Richard M. Rindler
Patrick J. Donovan
Harisha J. Bastiampillai
Michael P. Donahue
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007
Counsel for Allegiance Telecom, et al.

Theodore R. Kingsley
Richard M. Sbaratta
BellSouth Corporation
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375

Jonathan Askin
General Counsel
Assn. for Local Telecommunications Services
888 17th Street, N.W., Suite 1200
Washington, D.C. 20006

Robert Holleyman
President and CEO
Business Software Alliance
1150 18th Street, N.W., Suite 700
Washington, D.C. 20036

David L. Lawson
C. Frederick Beckner III
Michael J. Hunseder
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
Counsel for AT&T Corp.

Stephen L. Goodman
Wilkinson Barker Knauer, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
Counsel for Catena Networks, Inc.

Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
Federal Communications Commission
445 12th Street, S.W., Suite 5-C327
Washington, D.C. 20554

Caressa Bennet
Bennet & Bennet, PLLC
1000 Vermont Avenue, N.W., 10th Floor
Washington, D.C. 20005
Counsel for Cellular Mobile Systems of St. Cloud, LLC

Michael H. Pryor
Sara F. Leibman
Angela F. Collins
Susan F. Duarte
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
Counsel for CompTel/ASCENT Alliance and NewSouth Communications Corp

Gary Shapiro
President and CEO
Consumer Electronics Association
2500 Wilson Boulevard
Arlington, VA 22201

Praveen Goyal
Senior Counsel for Government and Regulatory Affairs
Covad Communications Company
600 14th Street, N.W., Suite 750
Washington, D.C. 20005

Richard M. Rindler
Patrick J. Donovan
Joshua M. Bobeck
Ulises R. Pin
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007
Counsel for El Paso Networks, LLC, FPL Fibernet, LLC, and McLeodUSA Telecommunications Services

Craig J. Brown
Sharon J. Devine
Qwest Communications International Inc.
607 14th Street, N.W., Suite 950
Washington, D.C. 20005

Rhett Dawson
President
Information Technology Industry Council
1250 I Street, N.W., Suite 200
Washington, D.C. 20005

Ruth Milkman
Gil M. Strobel
Richard D. Mallen
Lawler, Metzger & Milkman, LLC
2001 K Street, N.W., Suite 802
Washington, D.C. 20006
Counsel for MCI

Jerry Jasinowski
President
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Genevieve Morelli
Jennifer Kashatus
Kelley Drye & Warren, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Counsel for PACE, NuVox Inc., Talk America, Inc., and XO Communications, Inc.

George Scalise
President
Semiconductor Industry Association
181 Metro Drive, Suite 450
San Jose, CA 95110

David Cosson
Clifford C. Rohde
Kraskin, Lesse & Cosson, LLC
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
Counsel for Rural Independent Competitive Alliance

John E. Benedict
H. Richard Juhnke
Sprint Corporation
401 9th Street, N.W.
Suite 400
Washington, D.C. 20004

Christopher Wright
Timothy J. Simeone
Maureen K. Flood
Harris, Wiltshire & Grannis LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036
Counsel for Z-Tel Communications, Inc.

Jim Lamoureaux
Christopher M. Heimann
Gary Phillips
Paul K. Mancini
SBC Communications, Inc.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005

Matthew J. Flanigan
President
Telecommunications Industry Association
1300 Pennsylvania Avenue, N.W., Suite 350
Washington, D.C. 20004

Qualex International
Portals II
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554

Carole Walsh

WC Docket No. 04-48
Attachment 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of SBC Communications Inc 's Petition for Forbearance Under 47 U.S C. § 160(c)	WC Docket No. 03-255

PETITION FOR FORBEARANCE OF SBC COMMUNICATIONS INC.

Pursuant to 47 U S C. § 160(c) and 47 C.F.R. § 1.53, SBC Communications Inc. ("SBC") requests that the Commission forbear from applying the terms of 47 U.S.C. § 271(c)(2)(B) to the extent, if any, those provisions impose unbundling obligations on SBC that this Commission has determined should not be imposed on incumbent local exchange carriers ("ILECs") pursuant to 47 U S C § 251(d)(2).

In its pending petition for reconsideration of the *Triennial Review Order*,[1] BellSouth correctly points out why the Commission was incorrect when it concluded that Bell operating company ("BOC") "obligations under section 271 are not necessarily relieved based on any determination [the Commission] make[s] under the section 251 unbundling analysis." *Triennial Review Order* ¶ 655 [2] In fact, the Commission has consistently held that the scope of the unbundling obligations under the Competitive Checklist is no more extensive than the scope of

[1] *See* BellSouth's Petition for Clarification and/or Partial Reconsideration at 12-15, CC Docket Nos. 01-338, *et al* (FCC filed Oct. 2, 2003) ("*BellSouth Reconsideration Petition*").

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos 01-338 *et al.*, FCC 03-36 (rel Aug. 21, 2003) ("*Triennial Review Order*"), *petitions for review pending, United States Telecom Ass'n v FCC*, Nos. 03-1310 *et al* (D.C. Cir.).

those same obligations under section 251 [3] That holding, moreover, is faithful both to the letter of section 271 – which, as BellSouth again explains, was intended to provide market-opening requirements in the event an application for section 271 relief *preceded* Commission unbundling rules – and to the intent of Congress – which cannot be thought to have intended that the limits on unbundling in section 251(d)(2) applied *only* to the incumbent LECs that happen not to be Bell operating companies.

In the event the Commission declines to reconsider that point, however – and adheres to its determination that Checklist Items 4, 5, 6, and 10 impose unbundling obligations independent from section 251, *see Triennial Review Order* ¶ 654 – it must forbear from applying those obligations to network elements that the Commission has determined need not be unbundled under section 251. The unambiguous language of the Telecommunications Act of 1996 ("1996 Act") *requires* the Commission to forbear from applying unbundling regulations where they are unnecessary and where doing so is consistent with the public interest. Under the D C. Circuit's decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert denied*, 123 S. Ct. 1571 (2003), where the Commission concludes that competitive LECs

[3] *See* Memorandum Opinion and Order, *Application by Qwest Communications International, Inc for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303, 26502-03, ¶¶ 358-359 (2002); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc , et al , for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, 6361, ¶ 241 (2001), *aff'd in part and remanded, Sprint Communications Co v FCC*, 274 F 3d 549 (D.C Cir 2001); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc , et al Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20775, ¶ 113 (2001), *aff'd, AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D C. Cir Nov. 18, 2002) (*per curiam*); Memorandum Opinion and Order, *Application of Verizon New England Inc , et al , For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9135, App. B, ¶ 1 (2001), *aff'd in part, dismissed in part, and remanded in part, WorldCom, Inc v FCC*, 308 F.3d 1 (D.C Cir. 2002).

("CLECs") are not impaired without access to a particular element, it reflects a determination that the element is suitable for competitive supply. In such circumstances, it is *competition*, not unbundling, that ensures that the functionality is available on just and reasonable terms to the benefit of consumers And, indeed, as the D C. Circuit has held, unbundling in such circumstances is affirmatively harmful – and hence contrary to the public interest – because it imposes substantial costs, including disincentives to invest and the costs associated with managing forced sharing requirements, without any offsetting benefit in the form of a significant enhancement to competition

Forbearance from any section 271 unbundling obligations is particularly appropriate with respect to the broadband facilities – including fiber-to-the-premises loops, packet switches, and the packetized capabilities of hybrid copper-fiber loops – that the *Triennial Review Order* held need not be unbundled under section 251. The core achievement of the *Triennial Review Order* was the Commission's decision not to unbundle broadband facilities. That decision, the Commission explained, is intended to create a "race to build next generation networks," with the result of "increased competition in the delivery of broadband services." *Triennial Review Order* ¶ 272. That race will come about, however, only if there is certainty in the marketplace. Yet, as Verizon has thoroughly explained in its pending petition for forbearance, the application of section 271 unbundling obligations to the same facilities the Commission has said need *not* be unbundled for purposes of section 251 would create massive uncertainty, and would accordingly frustrate the core goal of the *Triennial Review Order* the desire to facilitate the widespread deployment of broadband infrastructure. Already CLECs are filing petitions with state commissions asking those commissions to re-impose broadband unbundling obligations under

the auspices of section 271.[4] The benefits of the Commission's decision to *reject* unbundling of broadband facilities will thus be lost unless the Commission makes clear – either by granting BellSouth's reconsideration petition or through forbearance – that section 271 is not a backdoor through which unbundling obligations that have been eliminated can be reimposed. Any other result would be directly contrary both to the goals outlined in the *Triennial Review Order* itself and to the statutory directive in section 706 of the 1996 Act to facilitate the widespread deployment of broadband technologies

I. The Commission Should Forbear from Requiring a BOC To Unbundle Any Network Element Under Section 271(c)(2)(B) That Does Not Meet the Impairment Standard Under Section 251(d)(2)

Section 10 of the Communications Act of 1934 provides that the Commission "*shall* forbear from applying any regulation or any provision of" the Communications Act "to a telecommunications carrier or telecommunications service," if it determines that: (1) enforcement of the regulation or provision "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory", (2) "enforcement of such regulation or provision is not necessary for the protection of consumers", and (3) "forbearance from applying such provision or regulation is in the public interest." 47 U.S.C § 160(a) (emphasis added). Where the Commission determines

[4] *See, e g*, Covad and MCI's Brief in Response to Order Nos. 35 and 5, *Complaint of Covad Communications Company, et al, Against Southwestern Bell Telephone Company, et al, for Post-Interconnection Agreement Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line-Sharing, PUC Proceeding for Resolution of Certain Issues Severed from PUC Docket Number 22469*, Docket Nos. 22469 & 22635 (Tex PUC filed Oct. 24, 2003) ("Covad/MCI Texas Brief").

that CLECs are not impaired without access to a network element – such that the element need not be unbundled under section 251 – each of these tests is plainly met, and this Commission is required to forbear from any additional unbundling requirements imposed by section 271.

First, where CLECs are not impaired without access to a network element, it follows that unbundling is not necessary to ensure that the "telecommunications service" the ILEC provides with that element is available on "just and reasonable" – as well as "not unjustly or unreasonably discriminatory" – terms. In light of the D.C Circuit's binding *USTA* decision, where the Commission concludes that CLECs are not impaired without access to a network element, it reflects the Commission's determination that the element is capable of "competitive supply." 290 F.3d at 427. And it is that "competitive supply" – not unbundling – which ensures that the element in question is not a bottleneck, and thus that unbundling of that element is "not necessary" to ensure that the resulting service is itself subject to competition *See Triennial Review Order* ¶ 84 (the conclusion that CLECs are not impaired without access to a network element reflects the Commission's determination that "lack of access" to that element does not "pose[] a barrier or barriers to entry . . . likely to make entry into a market uneconomic") [5]

Second, in the absence of impairment, unbundling is plainly not necessary "for the protection of consumers." As with the first criterion, the fact that CLECs are not impaired without access to a particular element – and that, accordingly, the element is capable of "competitive supply" – is enough, standing alone, to ensure the protection of consumers. Indeed, the Commission has squarely held, in this precise context, that consumers stand to benefit when

[5] *See also* Memorandum Opinion and Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*NDA Order*") ("*competition* is the most effective means of ensuring" that a service is available on "just and reasonable" and "not unjustly and unreasonably discriminatory terms") (emphasis added).

"competition among providers" is permitted to flourish.[6] Where unbundling is required in the absence of impairment, by contrast, it thwarts competition – and thus the interests of the consumers this provision is intended to protect – by diminishing the incentive for all carriers to innovate and to deploy new facilities.

Third, where CLECs are not impaired without access to an element, it is clear that forbearance from unbundling under section 271 is consistent with the public interest. As the D.C Circuit has made clear, the Commission's impairment analysis under section 251 must strike a balance between the undeniable costs of unbundling – including the "disincentive to invest in innovation and . . . complex issues of managing shared facilities" – and the purported benefits – *i e*, "eliminating the need for separate construction of facilities where such construction would be wasteful " *USTA*, 290 F.3d at 427. Where the Commission has concluded that CLECs are *not* impaired, it thus reflects the Commission's judgment that the costs of unbundling outweigh the benefits – *i e*, that unbundling would be affirmatively harmful to competition Application of section 271 unbundling in the teeth of such a judgment would plainly be contrary to the public interest [7]

That is especially so when the Commission takes into account, as it must, whether forbearance would "promote competitive market conditions." 47 U.S.C. § 160(b).[8] Competitive market conditions require all carriers – CLECs and ILECs alike – to make judgments regarding

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[6] Memorandum Opinion and Order, *Petition of SBC Communications Inc for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services*, 18 FCC Rcd 8134, ¶ 16 (2003)

[7] *See NDA Order*, 14 FCC Rcd at 16277-78, ¶ 46 (Commission's forbearance authority must be exercised in pursuit of "the fundamental objective of the 1996 Act," which "is to bring consumers of telecommunications services in all markets the full benefits of competition").

[8] *See NDA Order*, 14 FCC Rcd at 16277-78, ¶ 46.

whether and the extent to which to invest in particular facilities. Unbundling necessarily distorts those incentives, by "reduc[ing] or eliminat[ing] the incentive for an ILEC to invest in innovation (because it will have to share the rewards with CLECs), and also for a CLEC to innovate (because it can get the element cheaper as a UNE)." *USTA*, 290 F.3d at 424 Where unbundling does not "bring on a significant enhancement of competition," *id* at 429 – which is necessarily the case where CLECs are not impaired without access to the element in question – it follows that these market distortions undermine competitive market conditions, thus reinforcing the view that forbearance from any such unbundling obligations under section 271 furthers the public interest

The mandatory nature of forbearance under the statute – which, again, states that the Commission "shall" forbear where, as here, the statutory requirements are met – is in no way undermined by the fact that the Commission may not forbear from applying specific provisions of section 271 until the provisions in question "have been fully implemented " 47 U.S.C. § 160(d) As this Commission has now made clear in its recent decision not to forbear from applying the OI&M sharing prohibition under section 272(b)(1), it will examine each provision of section 271 separately to determine whether it has been "fully implemented."[9] Whereas the Commission found that section 271(d)(3)(B), which requires the Commission to find that "the requested authorization will be carried out in accordance with the requirements of section 272," will not be "fully implemented" in a particular state until three years after the application is granted for that state, the Commission expressly did "not address whether any other part of

[9] *See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53 203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, ¶¶ 6-7, CC Docket No 96-149, FCC 03-271 (rel Nov. 4, 2003)

section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[10] Indeed, with respect to the Competitive Checklist, which has no similar temporal requirement, it is clear that those section 271 requirements have been "fully implemented" once the section 271 application has been granted.[11] Otherwise, it is difficult to see how the "fully implemented" requirement of section 10(d) avoids becoming a complete nullity. At the very least, it would be reasonable to conclude that the obligations of the Competitive Checklist have been "fully implemented" once section 271 has been granted *and* the Commission has determined not to impose the particular unbundling obligation under section 251(d)(2).

II. At a Minimum, the Commission Should Forbear from Applying the Section 271 Unbundling Obligations to Those Network Elements Used To Provide Broadband Services

As Verizon recently explained, the case for forbearance from any 271 unbundling obligations is particularly strong in the broadband context.[12] "[B]roadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age." *Triennial Review Order* ¶ 241. As the Commission made

[10] Id. ¶ 6 (emphasis added)

[11] The Commission has now granted section 271 relief in 47 states and the District of Columbia, including – most importantly for purposes of this petition – all of SBC's in-region states. As this Commission recognized, whether or not the Competitive Checklist requirements are now fully implemented is a different question from whether the obligations of section 272 have been fully implemented. In granting the section 271 applications, the Commission has expressly found – and, indeed, was *required* to find – that the Bell Company applicant had "*fully implemented* the competitive checklist in [section 271(c)(2)(B)]." *Id.* § 271(d)(3)(A)(i) (emphasis added). In light of those findings, and because the requirements of section 10 are met as discussed above, the Commission must forbear from applying any unbundling requirements imposed by the checklist to network elements that the Commission has held do not meet the impairment standard of section 251(d)(2).

[12] *See* New Verizon Petition Requesting Forbearance from Application of Section 271, CC Docket No. 01-338 (FCC filed Oct. 24, 2003) ("*Verizon Broadband Petition*"), *see also* Public Notice, FCC 03-263 (Oct. 27, 2003) (establishing comment cycle).

clear, moreover, in the *Triennial Review* proceeding, its "primary regulatory challenge for broadband [wa]s to determine how [the FCC could] help drive the enormous infrastructure investment required to turn the broadband promise into a reality." *Id* ¶ 212. And the Commission met that challenge by "provid[ing] sweeping regulatory relief for broadband and new investments," including regulatory relief for packet-switching, fiber-to-the-premises loops, and the packet-switched capabilities of "hybrid fiber-copper facilities." *Id* , Separate Statement of Commissioner Martin at 2, *see also id* , Separate Statement of Chairman Powell at 1 (lauding the FCC's efforts "to create a broadband regulatory regime that will stimulate and promote deployment of next-generation infrastructure")

The linchpin of that "sweeping regulatory relief" is the certainty the Commission purported to provide regarding incumbent LEC broadband investments. As the Commission explained, its decision not to unbundle broadband facilities was intended to preserve "incentive[s]" for ILECs "to deploy fiber (and associated next-generation network equipment, such as packet switches and digital loop carrier ("DLC") systems) and develop new broadband offerings " *Triennial Review Order* ¶ 290. By "eliminat[ing] most unbundling requirements for broadband," *id* ¶ 4, the *Triennial Review Order* purports to provide ILECs with "certainty that their fiber optic and packet-based networks will remain free of unbundling requirements," so that they "will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market," *id* ¶ 272.

Critically, however, if the Commission concludes that section 271 imposes unbundling obligations independent of section 251, and if it declines to forbear from applying those obligations, the *Triennial Review Order*'s effort to provide "sweeping regulatory relief" for broadband will be for naught As Verizon has demonstrated in detail – with examples that apply

equally to SBC and other Bell companies – the application of section 271 unbundling obligations to broadband facilities would require time-consuming and expensive re-design of integrated fiber network architectures to create, and then provide access to, artificial sub-components (or "elements").[13] In addition, the imposition of such unbundling obligations would require the development of still more operational systems – on top of the comprehensive systems the Bell companies have already spent hundreds of millions of dollars to deploy – to support CLEC access to next-generation technologies that the Commission has held CLECs are equally capable of deploying.[14] Finally, the application of section 271 unbundling obligations, coupled with the history of the last seven years, in which section 251 unbundling obligations have evolved and expanded at every turn, would interject enormous uncertainty into Bell company efforts to develop and deploy broadband infrastructure [15]

This last consideration – the uncertainty associated with the scope of any unbundling obligations the Commission might seek to enforce under section 271 – takes on added significance in view of the Commission's assertion of jurisdiction over the pricing of elements unbundled under that provision *See Triennial Review Order* ¶¶ 656-657 (correctly concluding that the Commission's TELRIC rules do not apply to elements that must be unbundled under section 271, but concluding that such elements must be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202"). As Verizon properly points out, it is far from clear how the Commission intends to apply that jurisdiction.[16] At the same time, it *is* clear that CLECs will attempt to involve the states in

[13] *See Verizon Broadband Petition* at 9-10.

[14] *See id* at 10-11.

[15] *See id* at 11-12

[16] *See Verizon Broadband Petition* at 12.

setting rates for elements unbundled under section 271, notwithstanding the absence of any statutory basis for such a state role.[17] And, in all events, as the D.C. Circuit has explained, *any* attempt by *any* regulator – state or federal – to exercise jurisdiction over the rates for these elements will necessarily diminish the incentive to invest for CLECs and ILECs alike.[18]

It is accordingly clear that the application of section 271 unbundling obligations to broadband facilities would fatally undermine the Commission's avowed goal of facilitating the widespread deployment of broadband facilities. And it is equally clear that such a result is directly contrary to the 1996 Act. As explained above, the forbearance test articulated in section 10(a) focuses in substantial part on the public interest. "[T]he development of broadband infrastructure," the Commission has explained, "is a fundamental and integral step in ensuring that consumers are able to fully reap the benefits of the information age," and it plainly implicates the public interest. *Triennial Review Order* ¶ 212. Indeed, "more broadly," broadband deployment "is vital to the long-term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies." *Id* The devastating effects that section 271 unbundling obligations would have on broadband deployment would thus prevent consumers from "reap[ing] the benefits of the information age," and it would threaten this country's "preeminence" in information and telecommunications technologies. It is difficult to imagine an outcome more directly at odds with the public interest, or – as a result – a case better suited for forbearance.

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[17] *See id , see also* Covad/MCI Texas Brief.

[18] *See USTA*, 290 F 3d at 424 ("[M]any prices that *seem* to equate to cost [reduce or eliminate incentives to invest for ILECs and CLECs]. Some innovations pan out, others do not If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.")

That is especially so, moreover, in light of the Commission's statutory mandate, in section 706 of the 1996 Act, to encourage deployment of "advanced telecommunications capabilit[ies]" by using "methods that remove barriers to infrastructure investment."[19] In the *Triennial Review* proceeding, "[a]ll parties agree[d]" that the broadband technologies at issue here "meet the definition of advanced telecommunications capability" in section 706 *Triennial Review Order* ¶ 278 And, as the Commission made clear, its decision *not* to unbundle those facilities was the best way to fulfill the directive in section 706 to facilitate the deployment of those facilities "particularly in light of a competitive landscape in which competitive LECs are leading the deployment of" many of those facilities, "removing incumbent LEC unbundling obligations . . will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market " *Id* , *see also, e.g., id* ¶ 541 ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal [under section 706].").

By the same token, section 706 compels the exercise of the Commission's forbearance authority to ensure that any section 271 unbundling obligations do not undo the Commission's *Triennial Review* efforts to free broadband from unbundling Indeed, the Commission recognized more than five years ago that "section 706(a) directs the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services."[20] If section 706 supports the decision not to

[19] Telecommunications Act of 1996, Pub L. No. 104-104, § 706(a), 110 Stat 56, 153 (reprinted at 47 U S C § 157 note).

[20] Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011,

unbundle broadband facilities for purposes of section 251 – and the Commission has unequivocally held that it does – then so too does that section support forbearance from the application of section 271 unbundling obligations to those same facilities. Neither step, standing alone, is sufficient to ensure that consumers benefit from the undeniable benefits of widespread broadband deployment. Rather, both steps are critical to provide the certainty necessary to support the massive investment that SBC and the other Bell companies are on the verge of making in this critically important arena.

Forbearance is also appropriate, moreover, because section 271 itself was intended, at most, to ensure that the BOCs provided access to the core legacy systems that make up the traditional local telecommunications network. The whole point of the Competitive Checklist was to guarantee that, prior to entering the long-distance market, the BOCs provide competitors access to the systems and facilities necessary for new entrants to compete in the provision of local telecommunications services. Although the BOCs' historical control over the circuit-switched networks within their regions may have justified Congress's original purpose in ensuring that the availability of access to those narrowband facilities would be a condition for long-distance relief, there is no similar justification for requiring the unbundling of broadband facilities under section 271 As the Commission recognized, the BOCs enjoy no special advantages with respect to these next-generation networks. For example,

> [w]ith respect to new [fiber-to-the-home ("FTTH")] deployments (*i e* , so-called "greenfield" construction projects), we note that the entry barriers appear to be largely the same for both incumbent and competitive LECs – that is, both incumbent and competitive carriers must negotiate rights-of-way, respond to bid requests for new housing developments, obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs. Indeed, the record indicates that competitive

24044-45, ¶ 69 (1998) (emphasis added)

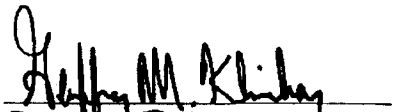
> LECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation

Triennial Review Order ¶ 275 (footnote omitted). In other words, "incumbent LECs do not have a first-mover advantage that would compound any barriers to entry in this situation." *Id* Similarly, this Commission found that "there do not appear to be any barriers to deployment of packet switches that would cause [it] to conclude that requesting carriers are impaired with respect to packet switching " *Id* ¶ 539, *see also id* ¶ 292 (recognizing that cable companies, not the BOCs, are the market leaders in deployment of high-speed Internet access services over broadband facilities). For this reason as well, forbearing from requiring the BOCs to unbundle their facilities for use in the broadband market – a market in which the BOCs, as this Commission has found, are not remotely dominant – is entirely consistent with the purposes of the 1996 Act generally and with section 271 in particular.

CONCLUSION

If the Commission declines to reconsider its decision in the *Triennial Review Order* that the unbundling obligations contained in the section 271 checklist are independent of the unbundling requirements under section 251(d)(2), it should forbear altogether from requiring the unbundling of loops, transport, switching, and signaling under section 271 in a manner inconsistent with the unbundling requirements established by this Commission for those same elements under section 251. At the very least, it should forbear from imposing section 271 unbundling obligations with respect to the BOCs' broadband facilities.

Respectfully submitted,



GARY L. PHILLIPS
CHRISTOPHER HEIMANN
SBC COMMUNICATIONS INC
1401 I Street, N.W , 4th Floor
Washington, D C. 20005
(202) 326-8903

GEOFFREY M. KLINEBERG
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900

November 6, 2003

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)	WC Docket No. 03-235

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
4th Floor
Washington, D.C. 20005
(202) 326-8903

GEOFFREY M. KLINEBERG
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900

Counsel for SBC Communications Inc.

December 12, 2003

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INTRODUCTION AND SUMMARY

The D.C. Circuit made clear in *USTA* that unbundling is not an unalloyed good – rather, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA*"), *cert denied*, 123 S. Ct. 1571 (2003). This Commission understood this clearly when it recognized in the *Triennial Review Order*[1] that "[t]he D.C. Circuit . . . cautioned the Commission against imposing the costs of unbundling if doing so would not bring on a significant enhancement of competition." 18 FCC Rcd at 17133, ¶ 256 n.760. "[W]hen lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic," *id.* at 17035, ¶ 84, then, according to this Commission, the benefits of unbundling outweigh its costs. But where the Commission has found no impairment, the costs outweigh the benefits, and requiring the unbundling of such a network element – whether pursuant to section 251(d)(2), section 271(c)(2)(B), or any other provision of law – would constitute both "bad policy and bad law." *Id.* at 17505 (separate statement of Chairman Powell).

It follows from these principles that, once this Commission has concluded that CLECs would not be "impaired" without unbundled access to a particular element, the conditions mandating forbearance are satisfied: (1) enforcement of the unbundling obligation would not be necessary to ensure that charges and practices are just and reasonable, because competition will

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *petitions for mandamus and review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir.).

set the market price; (2) enforcement of the unbundling obligation is not necessary for the protection of consumers, because consumers will have choices among competing facilities-based providers facing no barriers to entry; and (3) forbearance from applying the unbundling obligation is consistent with the public interest, because it will reduce the costs of unnecessary unbundling – costs measured both in terms of disincentives to invest in innovative technologies and in terms of the practical difficulties of administering leased facilities.

This is particularly true in the context of broadband facilities. Indeed, no less an authority than AT&T has observed the "universally accepted" "fundamental economic truth" that, as a general matter, mandatory access obligations come at the high cost of stifling facilities investment.[2] And, as AT&T has stressed, that "fundamental economic truth" is particularly applicable in the broadband marketplace. "Competition in the nascent broadband Internet services business is thriving," AT&T has explained, and there is no "serious risk of abuse of a bottleneck monopoly."[3] As a result, "[c]ompetition and marketplace forces will quite simply yield procompetitive and pro-consumer outcomes far more effectively than could any regulatory requirements," thus mandating a "hands-off" policy.[4]

The CLECs opposing this Petition have no answer to this essential economic reality. Indeed, they have willingly embraced this argument when it has suited their purposes. Instead, they spend the bulk of their efforts arguing that sections 10(d) and 271(d)(4) present legal obstacles to this Commission's authority to act on the Petition. But these legal arguments are entirely unpersuasive. Section 10(d) expressly provides that the Commission may forbear from

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[2] Comments of AT&T Corp. at 42, 68-69, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("AT&T Open Access Comments").

[3] *Id.*

[4] *Id.* at 2, 42.

applying the requirements of section 271 once it determines that the requirements in question have been fully implemented; now that the competitive checklist has been fully implemented in each of the states within SBC's region, section 10(d) presents no obstacle to this Commission's forbearance authority. At the very least, a checklist requirement regarding a particular network element has been "fully implemented" when this Commission has concluded that CLECs are not impaired without access to that network element.

Likewise, section 271(d)(4), which prohibits the Commission from limiting or extending the competitive checklist, applies only at the time the Commission is reviewing a Bell company application to determine whether the applicant has "fully implemented the competitive checklist in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(3)(A)(i). Indeed, were it otherwise, the Commission might never be able to forbear from enforcing the requirements of the competitive checklist, which is directly contrary to section 10(d)'s delineation of the circumstances in which the Commission *can* forbear from enforcing those requirements.

ARGUMENT

I. The Commission Should Forbear from Enforcing Any Section 271 Unbundling Obligations with Respect to Elements That the Commission Has Determined Do Not Meet the Impairment Test Under Section 251

SBC's Petition hinges on one core point: where the Commission concludes that CLECs are not impaired without access to a particular element, it reflects a determination that the element is "[]suitable" for competitive supply.[5] *See USTA*, 290 F.3d at 427. As the D.C. Circuit

[5] For the reasons contained in BellSouth's petition for reconsideration of the *Triennial Review Order*, SBC believes that the Commission was incorrect when it concluded that the obligations to provide access to particular network elements under section 271(c)(2)(B) survive a determination that those same network elements need not be unbundled under section 251. *See* Petition at 1-2. The Commission should grant BellSouth's petition on this issue; if it does not grant reconsideration, however, the Commission should grant SBC's Petition for Forbearance.

has explained – and as the Commission has now acknowledged – in such circumstances, unbundling is not only unnecessary, it is *affirmatively harmful.* It imposes substantial costs – not least of which are the costs associated with "complex issues of managing shared facilities" – "where [there is] no reason to think doing so would bring on a significant enhancement of competition." *Id.* at 427, 429. And it frustrates the Act's central goal of "facilities-based competition," *Competitive Telecomms. Ass'n v.FCC*, 309 F.3d 8, 16 (D.C. Cir. 2002) ("*CompTel*"), by "reduc[ing] or eliminat[ing] the incentive" for ILECs *and* CLECs "to invest in innovation," *USTA*, 290 F.3d at 424.

Where the Commission concludes that CLECs are *not* impaired without access to a particular facility, the forbearance requirements set forth in section 10 are met, and the Commission accordingly must forbear from enforcing any lingering unbundling obligations contained within section 271. Those forbearance requirements require the Commission to ask a series of questions – relating to the terms under which a telecommunications service is offered, whether consumers are adequately protected, and whether the public interest is served, *see* 47 U.S.C. § 160(a) – that share a common strand: whether the regulation in question is "*necessary*" to protect consumers and competition. *Id.* (emphasis added).[6] Under the principles outlined above, where CLECs are not impaired without access to a network element, unbundling of that network element cannot be considered "necessary" to that purpose. Rather, as the Commission has held – and as *USTA* subsequently echoed in resounding terms – "*competition* is the most

[6] *See* AT&T Comments at 6 ("the three specific requirements for forbearance contained in section 10(a) . . . focus on the protection of consumers and competition").

effective means of ensuring" that a service is available on "just and reasonable" and "not unjustly or unreasonably discriminatory" terms.[7]

Unable to counter this analysis, the CLECs simply ignore it. They contend instead that SBC's Petition seeks to avoid *all* unbundling obligations and that, as a result, "unbundled loops, transport, switching and signaling . . . would not be made available *at all*."[8] That is not so. Under the *Triennial Review Order*, most such facilities remain subject to unbundling pursuant to section 251. It is only where a facility is *not* subject to unbundling – because it is "[]suitable for competitive supply" – that section 10 requires the Commission, in order to promote "'facilities-based competition' over 'parasitic free-riding,'" *CompTel*, 309 F.3d at 16 (quoting *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 504 (2002)), to forbear from enforcing any additional unbundling obligations contained in section 271.

AT&T contends that forbearance in these circumstances would "rob the section 271 checklist unbundling requirements of any independent force."[9] But the time during which Congress intended those requirements to have "independent force" has long since passed. Those requirements were intended to open the local markets in the event an application for section 271 relief *preceded* Commission unbundling rules.[10] In any case, the standard against which SBC's Petition must be measured is not whether section 271's unbundling obligations would retain "independent force," but rather whether it satisfies the criteria set forth in section 10. Indeed, AT&T's test would render the Commission's forbearance authority meaningless; anytime the

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[7] Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) (emphasis added).

[8] *E.g.*, Anew *et al.* Comments at 8.

[9] AT&T Comments at 31; *see* Pace Coalition Comments at 10; MCI Comments at 6.

[10] *See* Petition at 2.

Commission forbears from enforcing a particular statute or regulation, it eliminates that statute's or regulation's "independent force" as applied in a particular context. AT&T's test plainly conflicts with Congress's decision to codify the Commission's forbearance authority and, indeed, to make its exercise mandatory upon a proper showing.

AT&T also insists that the Commission's determination not to unbundle certain network elements means only "that deployment by CLECs is merely *possible*"; and that, as a result, unbundling may still be "necessary" under section 10 to protect consumers and competition.[11] But AT&T has the standard wrong. A finding of non-impairment establishes not just that an element *can be* deployed by CLECs but also that the element is "*[]suitable* for competitive supply," *USTA*, 290 F.3d at 427 (emphasis added). In view of the Act's "preference for facilities-based competition," *CompTel*, 309 F.3d at 16, in that circumstance, the Commission is statutorily bound not only to put in place regulations to encourage such "competitive supply," but also to forbear from enforcing existing requirements that would discourage it.

Relatedly, the CLECs rely upon *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) – which did not involve the Commission's forbearance authority under section 10 – for the proposition that forbearance from unbundling obligations with respect to particular elements is inappropriate unless and until "actual competition" exists "with respect to supply of [those] network elements."[12] But, in *WorldCom*, the D.C. Circuit *upheld* the Commission's decision to grant ILECs special access pricing flexibility across *entire* MSAs, based solely on evidence of "irreversible investments in . . . facilities" in certain parts of the MSA. *See Pricing Flexibility Order*, 14 FCC Rcd 14221, ¶ 69 (1999); *WorldCom*, 238 F.3d at 459. As the Court explained, it is entirely reasonable and appropriate to "predict[]," based on evidence of competitive behavior

[11] AT&T Comments at 18.

[12] *Id.* at 34.

in a particular area, the extent of "competitive constraints upon future LEC behavior" in a much broader area. *WorldCom*, 238 F.3d at 459. It is that same approach, based on similar inferences, that SBC advocates here.[13]

Focusing on section 10(b)'s mandate to the Commission to "consider whether forbearance . . . will promote competitive market conditions," 47 U.S.C. § 160(b), the CLECs next contend that, as a rule, any step limiting mandatory access to Bell company facilities is contrary to the goal of "promot[ing] and enhanc[ing] competition."[14] Absent unbundling, they claim, "consumers will have fewer competitive alternatives."[15] Once again, this claim fails to appreciate the fact that this petition seeks forbearance from section 271 unbundling requirements only where this Commission has already concluded that CLECs are not impaired without access to the network element in question. And, in that circumstance – where the Commission had concluded that CLECs are not impaired – it necessarily has concluded that unbundling would do more harm to competition than good. It follows that refusing to order unbundling "will promote competitive market conditions." 47 U.S.C. § 160(b).[16]

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[13] AT&T also relies (at 34) on *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001). There, however, the D.C. Circuit *upheld* a Commission determination – against an AT&T and WorldCom argument that "border[ed] on being disingenuous" – that its pricing flexibility analysis is sufficient to satisfy the statutory forbearance criteria. *See id.* at 737; *Petition of U S WEST Communications Inc. For Forbearance from Regulation As a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 19947, ¶ 2 (1999). Rather than supporting the CLECs, that case confirms that the approach advocated here – *i.e.*, relying on a finding of non-impairment to establish generally that unbundling is not necessary to protect consumers and competition – is entirely consistent with the plain language of section 10.

[14] Anew *et al.* Comments at 9-10; Covad Comments at 8.

[15] *See, e.g.*, Pace Coalition Comments at 11.

[16] The CLECs relatedly contend that any step that could raise *their* costs is necessarily contrary to the "public interest" inquiry the Commission must undertake pursuant to section 10(b). *See, e.g.*, AT&T Comments at 29-30. That claim is rooted in the mistaken impression that the *CLECs'* interest necessarily equates with the "public interest." Nor is the Commission's *1998 Biennial Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd 242 (1999), to the contrary. *See id.* at 29. There, this Commission

Moreover, the CLECs' argument ignores the insight of *USTA* that "completely synthetic" competition generated by overbroad unbundling rules *limits* competitive alternatives, by discouraging competing carriers from developing and deploying their own facilities. *See* 290 F.3d at 424. As the D.C. Circuit has explained, whether unbundling will facilitate that goal – and thereby "promote competitive market conditions," 47 U.S.C. § 160(b) – involves a balance between, on one hand, the substantial social costs of unbundling, and, on the other, the prospect of "facilitat[ing] competition by eliminating the need for separate construction of facilities where [it] would be wasteful." *USTA*, 290 F.3d at 427.

Finally, the CLECs have no tenable response to the argument that forbearance is particularly appropriate here because Commission precedent raises a substantial question whether elements that are not unbundled pursuant to section 251 are subject to the unbundling obligations in section 271 in the first place. As we have explained, the Commission has consistently held that the scope of the unbundling obligations under the competitive checklist is no more extensive than the scope of those same obligations under section 251.[17] Accordingly, the Commission has consistently granted section 271 applications – and specifically found Bell-

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rejected USTA's petition to forbear from applying its depreciation prescription rules, because, at least in part, forbearance would increase depreciation expenses that "could be translated into higher rates through exogenous adjustments and above-cap filings." 15 FCC Rcd at 268, ¶ 63. The Commission concluded, under the circumstances, that "forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities)." *Id.* at 269, ¶ 63. But, once again, it is critical to recall that SBC's Petition seeks forbearance of the section 271 unbundling obligations only *after* this Commission has concluded that the particular network element is *not* a bottleneck facility – *i.e.*, that the lack of unbundled access to it poses no "barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *Triennial Review Order*, 18 FCC Rcd at 17035, ¶ 84.

[17] *See* Petition at 2 & n.3 (collecting cases).

company compliance with checklist items 4 and 6 – by concluding that the applicant had complied with the Commission's regulations under section 251.[18]

Rather than respond to this argument on its terms, the CLECs mischaracterize the Commission's orders. They claim, for example that the *Qwest Nine-State Order* and the *Arkansas/Missouri Order* never addressed the scope of the unbundling obligations under checklist item 6.[19] That is false. In the *Qwest Nine-State Order*, for example, the Commission held that, "[t]o satisfy its obligations under [checklist item 6], an applicant must demonstrate compliance with Commission rules relating to unbundled local switching."[20] Moreover, in the *Arkansas/Missouri Order*, the Commission recognized that, although the Missouri Commission needed to resolve a factual dispute between the parties, the Bell company's obligations under checklist item 6 were satisfied based on the evidence in the record that it "provid[ed] line class codes on a UNE basis in Missouri and thereby complies with this aspect of its unbundled switching obligation established in the *UNE Remand Order*."[21] Other orders are to the same

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[18] *See, e.g.*, Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18516-117, ¶ 327 (2000), *appeal dismissed, AT&T Corp. v. FCC*, No. 00-1295 (D.C. Cir. Mar. 1, 2001) (deciding not to require the unbundling of the splitter under checklist item 4 because the Commission "declined to exercise [its] rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element," which includes the splitter); *id.* ("[t]he Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter").

[19] *E.g.*, MCI Comments at 29.

[20] *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, 26500-26501, ¶ 357 (2002).

[21] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20775, ¶ 113 (2001), *aff'd, AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D.C. Cir. Nov. 18, 2002) (per curiam).

effect.[22] The CLECs' attempt to read requirements into section 271's unbundling obligations requirements that are broader than those applicable to all incumbent LECs under section 251 is flatly inconsistent with this Commission's precedent. The unbundling rules that this Commission has promulgated under section 251 have consistently been the yardstick by which the Bell companies' compliance with the separate unbundling obligations under section 271 has been measured. It follows, therefore, that, if the Commission rejects the arguments raised on reconsideration of the *Triennial Review Order* that section 271 does not apply at all, then, where the Commission determines that unbundling of a particular network element is no longer required under section 251, the Commission should forbear from requiring its unbundling under section 271.

II. Forbearance from 271 Obligations Is Particularly Appropriate with Respect to Broadband Facilities

SBC's Petition further established that forbearance from any section 271 unbundling obligations is particularly appropriate with respect to broadband facilities – including fiber-to-the-premises loops, packet switches, and the packetized capabilities of hybrid copper-fiber loops – that the *Triennial Review Order* held need not be unbundled under section 251. As the Commission explained, that decision is intended to create a "race to build next generation networks," with the result of "increased competition in the delivery of broadband services." 18 FCC Rcd at 17142, ¶ 272. Simply put, so long as the threat of unbundling pursuant to section 271 hangs over the marketplace – creating uncertainty over whether Bell companies will be permitted to reap the benefits of their investment in these new facilities and holding out hope for the CLECs that they will be permitted to free-ride on them – that race will be slowed significantly. And that, in turn, would frustrate a key goal of the *Triennial Review Order* as well

[22] *See* Petition at 2 n.3.

as of the Act itself – to "encourage the rapid deployment of new telecommunications technologies."[23]

Indeed, as SBC's Petition further explained – and as no commenter denies – the CLECs are *already* filing petitions with state commissions asking them to impose, pursuant to section 271, the exact same broadband unbundling this Commission *rejected* in the *Triennial Review Order*.[24] And the states have shown no indication that they intend to dismiss these petitions out-of-hand. Accordingly, absent decisive action by this Commission – making clear that section 271 is not a backdoor through which state commissions can undo this Commission's unbundling decisions – the Commission's efforts to create the stability and certainty necessary to justify broadband investment will be for naught.

The CLECs' primary objection to this is based on the assertion that SBC is a "*monopoly* supplier[] of last-mile broadband and next-generation capabilities."[25] This claim is astonishing. This Commission has found that "cable modem service is the most widely used means by which the mass market obtains broadband service." *Triennial Review Order*, 18 FCC Rcd at 17135-36, ¶ 262 & n.778.[26] And this Commission has recognized that "competitive LECs are leading the deployment" of fiber-to-the-premises loops, *id.* at 17145, ¶ 278, so "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market," *id.*

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[23] Telecommunications Act of 1996 pmbl., Pub. L. No. 104-104, 110 Stat. 56.

[24] *See* Petition at 3-4 & n.4.

[25] AT&T Comments at 25; *see* Covad Comments at 8; Pace Coalition Comments at 13; Sprint Nov. 17 Comments at 14.

[26] *See also* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2002* at Table 5 (June 2003).

AT&T nevertheless contends that the relief SBC seeks is inappropriate because it would result in no unbundling requirement for broadband facilities that the Commission has found *do* meet the impairment standard.[27] In particular, AT&T claims that the Commission found impairment with respect to the broadband capabilities of hybrid copper-fiber loops but that it nevertheless declined to unbundle those capabilities in the interest of encouraging ILECs "to deploy such facilities."[28] That is a misreading of the *Triennial Review Order*. In fact, the Commission found impairment only where a CLEC would be without any alternative to provide narrowband services to the mass market. 18 FCC Rcd at 17148, ¶ 286. And the Commission specifically found suitable alternatives to an intrusive unbundling approach where the ILEC provides "unbundled access to subloops, spare copper loops, and the non-packetized portion of incumbent LEC hybrid loops." *Id.* The Commission thus struck a balance between requiring the unbundling of these facilities for *narrowband services* – incumbents must provide "an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and [the] customer's premises," *id.* at 17153, ¶ 296 – while refraining from unbundling these facilities to provide *broadband services* – "the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market," *id.* at 17149, ¶ 288.[29] Contrary to AT&T's claim, the Commission found no impairment without access to these facilities with respect to broadband services, and there is no reason to reach a different conclusion under section 271.

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[27] *See* AT&T Comments at 20, 21-23.

[28] *Id.* at 21 (citing *Triennial Review Order*, 18 FCC Rcd at 17148, ¶ 286, 17150, ¶ 290).

[29] "[I]ncumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops *that are not used to transmit packetized information*." *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 289 (emphasis added).

The CLECs also contend that forbearance from broadband unbundling is inappropriate because consumers are increasingly seeking "both traditional and new broadband services over a single line from a single provider."[30] The theory here is that, absent unbundling, CLECs would be unable to offer a competing package, thus limiting consumer choice. This is not true. The availability of line splitting, together with the opportunity to enter into commercial line-sharing arrangements, significantly undermines the CLECs' argument that forbearance would somehow deprive them of the ability to compete in the broadband market. Indeed, just yesterday, AT&T announced that it offers broadband service pursuant to line splitting, "utiliz[ing] a nationwide data network provided by Covad," to consumers in 11 states "and plans to roll out the service in all states in which it provides . . . residential services."[31]

Moreover, contrary to the CLECs' claims, it is the *cable companies* – not the ILECs – that are leaders in providing broadband/data (and video) bundles. Aside from their dominance in the broadband and video arenas, cable companies are currently providing cable telephony to millions of homes,[32] and this is likely to increase substantially as they continue to deploy commercial voice-over-Internet-protocol services.[33]

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[30] AT&T Comments at 27.

[31] AT&T Press Release, *AT&T Adds DSL Service to Communications Bundle in Ohio*, Dec. 11, 2003.

[32] *See, e.g.*, Comcast Press Release, *Comcast Full Year and Fourth Quarter Results Meet or Exceed All Operating and Financial Goals* (Feb. 27, 2003); Cox Communications Press Release, *Cox Communications Announces Fourth Quarter Financial Results for 2002; Strong Demand for Cox's Digital Services Builds Solid Foundation for Continued Growth in 2003* (Feb. 12, 2003); Reply to Comments and Petitions to Deny Applications for Consent to the Transfer Control of AT&T Corp. and Comcast Corp. at 11, *Applications for Consent to the Transfer of Control of Licenses of Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, filed in MB Docket No. 02-70 (May 21, 2002) ("AT&T Broadband is capable of serving approximately seven million households, has enrolled over 1.15 million cable telephony customers, and is adding approximately 40,000 customers every month.").

[33] *See, e.g., Time Warner to Use Cable Lines to Add Phone to Internet Service*, N.Y. Times (Dec. 9, 2003) (Time Warner's deal with Sprint and MCI to offer VOIP service by the end

The CLECs have no answer, moreover, to the indisputable fact that forbearance will encourage SBC more actively to deploy broadband facilities and thus provide a competitive counterbalance to the dominant cable incumbents. Particularly with respect to next-generation packet-switched networks, the application of section 271 unbundling obligations would require time-consuming and expensive re-design of integrated fiber network architectures to provide access to sub-"elements" that have yet to be created, and it would also require SBC to develop additional operational systems to support CLEC access to the next-generation technologies that the Commission has held CLECs are equally capable of deploying.[34] The decision to forbear from enforcing any section 271 unbundling obligations will eliminate any such requirements and thus speed the deployment of broadband facilities.

In the CLECs' view, however, these undeniable public interest benefits are beside the point. As they see it, the Commission's conclusion in the *Triennial Review Order* that section 271 imposes unbundling obligations independent of section 251 is the end of this inquiry.[35] But that is clearly wrong. Whether section 271's unbundling requirements continue to apply to the Bell companies says nothing about whether, under the mandatory criteria of section 10, this Commission must nevertheless forbear from applying those requirements to the extent it has already concluded that there is no unbundling requirement under section 251. Indeed, if the Commission found – incorrectly, in SBC's view – that section 271 continues to apply as a statutory matter even after there is no longer an unbundling requirement under section 251, such a decision would *compel*, not preclude, forbearance.

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of 2004 "shows how quickly cable companies are transforming themselves into all-purpose telecommunications providers").

[34] *See* Petition at 9-10.

[35] *See* AT&T Comments at 22; Anew *et al.* Comments at 3-5; Covad Comments at 1-4; Pace Coalition Comments at 8-10; Z-Tel Letter at 2; MCI Comments at 8-9.

In addition, there is *no* evidence in the *Triennial Review Order* that this Commission's determination not to unbundle broadband facilities under section 251 was contingent on the continued application of such obligations pursuant to section 271. On the contrary, the Commission was unequivocal that, "with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." 18 FCC Rcd at 17141, ¶ 272. It would completely undermine this Commission's intention to stimulate deployment of broadband facilities to reimpose (pursuant to section 271) the very unbundling obligations that the Commission wisely elected not to impose pursuant to section 251. Moreover, at the time the Commission released the *Triennial Review Order*, it was considering a Verizon petition prospectively seeking forbearance from any section 271 unbundling obligations for elements that the Commission declined to unbundle pursuant to section 251. It is therefore inconceivable that the Commission would have simply *assumed* that any such unbundling obligations would continue indefinitely.

AT&T argues to the contrary, noting the Commission's "'expect[ation] that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops.'"[36] By its terms, however, the Commission's statement refers to the unremarkable fact that, because of the intensely competitive nature of the broadband market, ILECs have every incentive to keep as much traffic as possible on their own networks and therefore every incentive to create wholesale relationships to accomplish that end. But such *voluntary* arrangements are a far cry from *mandatory* unbundling obligations –

[36] AT&T Comments at 22 (quoting *Triennial Review Order*, 18 FCC Rcd at 17131-32, ¶ 253); *see* Pace Coalition Comments at 14.

complete with price regulation in some unspecified form and the "complex issues of managing shared facilities," *USTA*, 290 F.3d at 427.[37]

As SBC explained in the Petition, moreover, forbearance in the broadband context is further supported by section 706's express mandate to encourage deployment of "advanced telecommunications capabilit[ies]" by using "methods that remove barriers to infrastructure investment."[38] There can be no question that unbundling is a "barrier[] to [the] infrastructure investment" necessary to deploy new broadband facilities – indeed, the D.C. Circuit in *USTA* already held as much. *See* 290 F.3d at 429. Thus, as the Commission squarely held in the *Triennial Review Order*, section 706 strongly supports the decision *not* to unbundle broadband facilities. *See* 18 FCC Rcd at 17145, ¶ 278, 17323, ¶ 541. By the same logic, the same provision strongly supports the exercise of the Commission's forbearance authority to decline to enforce any section 271 unbundling obligations to broadband facilities that the Commission has said need not be unbundled pursuant to section 251.

The CLECs dispute that result, reasoning that, as a statutory matter, "section 706 is *irrelevant* to the scope of a BOC's access obligations under section 271."[39] That is so, the theory goes, because, section 271 does not contain the same "at a minimum" clause that the Commission has relied upon in connection with section 251 to look beyond the impairment inquiry to determine whether unbundling would frustrate the goals of section 706.

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[37] In any event, if the CLECs were correct that the Commission was referring in paragraph 253 to unbundling obligations pursuant to section 271, it would have discussed these as "Bell-company" obligations. Instead, it expected that "incumbent LECs" in general would be developing these wholesale offerings. *See Triennial Review Order*, 18 FCC Rcd at 17131-32, ¶ 253.

[38] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153, *reprinted at* 47 U.S.C. § 157 note.

[39] AT&T Comments at 23; *see* Sprint Nov. 17 Comments at 10; Z-Tel Letter at 2; MCI Comments at 14.

This argument misses the point entirely. Section 706 is relevant in this context not to the proper construction of section *271*, but rather to the proper application of the Commission's forbearance authority pursuant to section *10(a)*. And, as the Commission has already held, far from being "irrelevant" to that question, section 706 is central to it. In particular, the *Advanced Services Report and Order* squarely held that "section 706(a) directs the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services."[40]

Finally, AT&T makes the remarkable claim that "unbundling imposed by section 271" would have no "material impact on SBC's investment incentives."[41] But AT&T has elsewhere argued the precise opposite. It has recognized the "universally accepted economic and public policy" principle that forced access discourages investment.[42] Indeed, AT&T has conceded that "[t]he prospect of regulation alone is enough to dampen investment" and that "[u]nnecessary access regulation would also deter innovation," which would be "devastating to the deployment of broadband services."[43] AT&T has further acknowledged that

> [t]he imposition of a rigid, forced access mandate would stunt the ability of companies to adjust to technological advances and changing consumer needs, discourage innovation, preclude parties from entering agreements tailored to their particular needs, inhibit the investment necessary to the continued development of new technologies and rapid deployment of broadband capabilities, and divert substantial resources to technical and operational problems stemming from regulatory compliance.[44]

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[40] Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-45, ¶ 69 (1998) (emphasis added).

[41] AT&T Comments at 24; *see also* MCI Comments at 18-19.

[42] AT&T Open Access Comments at 42, 68-69.

[43] *Id.* at 69.

[44] *Id.* at 68.

These principles do not vanish merely because the pricing of facilities unbundled pursuant to section 271 is to be governed by sections 201 and 202, instead of by TELRIC.[45] As SBC explained in its Petition, it is not clear how the Commission intends to apply those sections to any network elements made available under section 271. But, however it does so, one thing is clear: as the D.C. Circuit has explained, *all* regulated prices – even those that only "*seem* to equate to cost" – have the effect of reducing or eliminating incentives to invest for ILECs and CLECs alike. *USTA*, 290 F.3d at 424.

III. The Commission Has the Legal Authority to Forbear From Requiring the Unbundling of a Network Element Under Section 271 that No Longer Needs to be Unbundled Under Section 251

Unable to deny that SBC's Petition satisfies the statutory forbearance criteria – and that section 10 accordingly mandates that the Commission "shall" forbear from applying any independent section 271 unbundling obligations to elements the Commission has declined to unbundle for purposes of section 251 – the CLECs spend the bulk of their energies claiming instead that the Commission is statutorily foreclosed from providing that relief.

First, and most broadly, the CLECs contend that section 271(d)(4) forecloses the Commission from forbearing – *ever* – from enforcing any independent unbundling obligations in section 271.[46] That section prevents the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist." 47 U.S.C. § 271(d)(4). But this section simply directs the Commission to ensure full implementation of the competitive checklist *before* granting an application under section 271; in reviewing an application, it can neither add to nor subtract from the specified list of requirements. Once the Commission grants an application, it has necessarily

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[45] *See* AT&T Comments at 24-25.

[46] *See* AT&T Comments at 10; Anew *et al.* Comments at 5-7; Covad Comments at 4-5; Pace Coalition Comments at 2-3; Sprint Nov. 17 Comments at 6.

found the checklist requirements to have been "fully implemented" under section 271(d)(3)(A)(i). At that point, the requirements are eligible for forbearance under section 10(a).

Indeed, section 10 itself plainly contemplates that the Commission *can* on a proper showing forbear from enforcing the requirements of section 271. It provides specific language qualifying the Commission's general forbearance mandate – *i.e.*, establishing that it cannot exercise such authority with respect to section 271 *until* the requirements in question have been "fully implemented." *See* 47 U.S.C. § 160(d). It is impossible to understand why Congress would have included this qualification, if, as the CLECs contend, Congress intended to foreclose the Commission from forbearing from the requirements of the competitive checklist under *any* circumstances. As MCI concedes, the Commission must "'give effect, if possible, to every clause and word of a statute.'" MCI Comments at 9 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

Second, the CLECs contend that section 10(d)'s reference to the requirements having been "fully implemented" establishes that the Commission "cannot forbear from applying *any* requirement of section 251(c) or section 271 until *all* of the requirements of section 251(c) and section 271 have been 'fully implemented.'"[47] This is wrong. Congress chose the same phrase – "fully implemented" – to describe both the condition that must be satisfied before section 271 relief is granted and the condition that must be satisfied before the Commission's forbearance authority may be invoked. This "presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (citing *Sullivan v.*

[47] AT&T Comments at 12; Anew *et al.* Comments at 7-8; Covad Comments at 5-7; Pace Coalition Comments at 3-6; Z-Tel Letter at 2-3; MCI Comments at 19-22.

Stroop, 496 U.S. 478 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)) (internal quotation marks omitted).

In any case, the Commission itself has recently rejected the argument that section 10(d) prohibits it from forbearing from *any* particular section 271 requirement until section 271 *as a whole* has been "fully implemented." In the *OI&M Forbearance Order*, the Commission held that section 10(d) barred it from forbearing from applying section 272's requirements because those requirements – which, according to the Commission, were incorporated by reference into section 271 – had not yet been "fully implemented."[48] The Commission recognized, however, that its analysis "applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is 'fully implemented.'"[49]

That result, moreover, is compelled by the statutory text. Section 10(d) itself makes clear that only "*those* requirements" from which the Bell company petitioner seeks forbearance must be "fully implemented" before the Commission is authorized to forbear. *See* 47 U.S.C. § 160(d). Full implementation of the competitive checklist is, as AT&T itself explains, a "*precondition*" to obtaining long-distance authority.[50] Once that "precondition" is satisfied – which must happen *prior to* a grant of section 271 relief – the competitive checklist is "fully implemented" for purposes of *both* section 271 *and* section 10(d).

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[48] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, FCC 03-271, ¶ 5 (rel. Nov. 4, 2003) ("*OI&M Forbearance Order*").

[49] *Id.* ¶ 6 (emphasis added).

[50] AT&T Comments at 7 (emphasis added).

The CLECs contend that this plain reading of the statute leads to "absurd" results.[51] Specifically, they contend that this reading would permit the Commission, at "the very *moment* after granting a BOC long distance authority," to cease enforcement of the Bell companies' "continuing compliance with sections 251(c) and 271."[52] But that is not at all what SBC is arguing. Granting section 271 relief only means that the requirements of the competitive checklist have been fully implemented and that section 10(d) no longer presents a bar to this Commission's forbearing from the requirements of section 271. It is still necessary to justify forbearance under the standards of section 10(a). What is more, as explained above and in the Petition, the Commission's own section 271 orders *uniformly* limit the scope of their review of Bell company applicants' compliance with the competitive checklist to their compliance with the unbundling obligations imposed pursuant to section 251. It is hardly "absurd" to forbear from enforcing a purported requirement in the wake of section 271 relief where the Commission did not see fit to enforce that same requirement when reviewing the 271 application in the first place.

In any case, even if it were somehow unreasonable to assign the same meaning to the phrase "fully implemented" as it appears in different sections of the Act, once this Commission has decided that a particular network element no longer needs to be unbundled under the standards of section 251(d)(2), then at the very least it is reasonable to conclude that the checklist item corresponding to that network element in particular has been "fully implemented." Indeed, that conclusion flows logically from the *OI&M Forbearance Order*, in which the Commission concluded that different requirements under section 271 may become "fully implemented" at different times.[53]

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[51] *Id.* at 15; *see* MCI Comments at 21.

[52] AT&T Comments at 15-16; *See* Covad Comments at 5.

[53] *See OI&M Forbearance Order* ¶ 6.

Finally, the CLECs argue that forbearance under these circumstances would be contrary to the Commission's repeated pledges in the section 271 context to use section 271(d)(6) to monitor SBC's ongoing compliance with section 271.[54] But forbearance has nothing to do with SBC's continuing obligations to comply with the remaining requirements of section 271. If the Commission has concluded under section 251(d)(2) that a particular network element need not be unbundled, SBC should not be required to unbundle it under section 271. In every other respect, however, SBC would be obligated under section 271(d)(6) to remain in compliance with the requirements of section 271. The relief requested is limited, and this Commission retains its full authority to enforce all of the remaining obligations of section 271 (including those aspects of the competitive checklist that would be unaffected by granting this Petition) under section 271(d)(6).[55]

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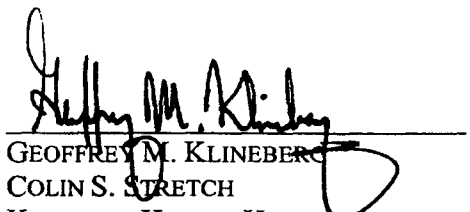
[54] *See* AT&T Comments at 14; Anew *et al.* Comments at 6; Covad Comments at 6; Z-Tel Letter at 3.

[55] Anew and others contend that SBC's Petition should be denied because it is similar to the Verizon petition that the Commission denied last month. *See* Anew *et al.* Comments at 2-3. But these commenters fail to acknowledge that Verizon specifically *withdrew* the narrowband portion of its petition before the Commission had acted. As for the Commission's denial of the broadband portion of that petition, that was based on the Commission's belief that Verizon had filed a *new* forbearance petition seeking the same relief. Those circumstances are not present here, and the Commission's treatment of Verizon's prior petition has no relevance to SBC's separate Petition.

CONCLUSION

The Commission should grant the Petition.

Respectfully submitted,



GARY L. PHILLIPS
CHRISTOPHER HEIMANN
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
4th Floor
Washington, D.C. 20005
(202) 326-8903

GEOFFREY M. KLINEBERG
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900

December 12, 2003

WC Docket No. 04-48
Attachment 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 03-260
Petition for Forbearance Under	)	
47 U.S.C. § 160(c)	)	

PETITION FOR FORBEARANCE OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Andrew D. Crain
Craig J. Brown
John S. Fischer
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2856

Attorneys for
QWEST COMMUNICATIONS
INTERNATIONAL INC.

December 18, 2003

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 03-____
Petition for Forbearance Under	)	
47 U.S.C. § 160(c)	)	

PETITION FOR FORBEARANCE OF QWEST COMMUNICATIONS INTERNATIONAL INC.

INTRODUCTION AND SUMMARY

Pursuant to section 10 of the Communications Act of 1934, as amended ("Act"),[1] Qwest Communications International Inc. ("Qwest") hereby respectfully submits this Petition requesting that the Federal Communications Commission ("Commission") exercise its authority to forbear from imposing an independent unbundling obligation pursuant to section 271(c)(2)(B) of the Act with respect to narrowband and broadband network elements that no longer are required to be unbundled pursuant to section 251(d)(2) of the Act.

As demonstrated below, establishing an independent and ongoing unbundling obligation under section 271 is fundamentally inconsistent with the Act and relevant court decisions and will impose substantial and unjustifiable operating and financial burdens on Qwest. Because the statutory conditions for forbearance have clearly been satisfied in this instance, this Petition should properly be granted.

[1] 47 U.S.C. §§ 151 *et seq.*

BACKGROUND

In the *Triennial Review Order*,[2] the Commission concluded that the Bell Operating Companies ("BOCs") have an "independent and ongoing access obligation" under section 271(c)(2)(B) to provide unbundled access to checklist items 4 (local loop transmission), 5 (local transport), 6 (local switching) and 10 (databases and associated signaling) to the extent those elements are no longer subject to unbundling pursuant to section 251(d)(2).[3] The Commission went on to find that "network elements required only under section 271" should be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[4]

In recently filed petitions, both Verizon and SBC have demonstrated convincingly that the Commission should properly forbear from establishing an independent unbundling obligation pursuant to section 271(c)(2)(B) of the Act with respect to network elements that do not meet the impairment standard set out in section 251(d)(2) of the Act.[5] The *Verizon Petition* and the *SBC*

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[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*"), *appeals pending sub nom. USTA v. FCC*, No. 00-1012 (D.C. Cir. *expedited briefing schedule established* Nov. 14, 2003).

[3] *Id.* ¶¶ 652, 654.

[4] *Id.* ¶ 656.

[5] On July 29, 2002, Verizon filed a Petition for Forbearance Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338 ("*Original Petition*"), requesting the Commission to forbear from applying items four, five, six and ten of the section 271 competitive checklist once the corresponding elements no longer need to be unbundled pursuant to section 251(d)(2). On October 24, 2003, Verizon filed an *ex parte* letter ("*Ex Parte Letter*") withdrawing its request for forbearance with respect to any narrowband elements that no longer needed to be unbundled pursuant to section 251. The Commission thereafter denied the *Original Petition* on the grounds that the *Ex Parte Letter* abandoned the core legal rationale underlying the *Original Petition*. *See* Public Notice, FCC 03-263 (rel. Oct. 27, 2003), *appeal pending sub nom. Verizon v. FCC*, No.

Petition differ in one respect, however. Whereas the *Verizon Petition* seeks forbearance only with respect to "the broadband facilities that the Commission has concluded need not be unbundled under section 251,"[6] the *SBC Petition* argues that while "the case for forbearance...is particularly strong in the broadband context[,]"[7] the Commission should also exercise its forbearance authority with respect to all "network elements that the Commission has determined need not be unbundled under section 251[,]"[8] including narrowband elements.

Qwest has previously submitted its comments in support of the *Verizon Petition* and the *SBC Petition.*[9] Through this Petition, Qwest demonstrates that ample justification exists for the Commission to forbear from applying an independent unbundling obligation under section 271 with respect to both narrowband and broadband elements that no longer need to be unbundled pursuant to section 251. Accordingly, the relief requested herein should properly be granted.

ARGUMENT

I. ESTABLISHING AN INDEPENDENT AND ONGOING UNBUNDLING OBLIGATION UNDER SECTION 271 IS FUNDAMENTALLY INCONSISTENT WITH THE ACT AND RELEVANT COURT DECISIONS

As shown below, the establishment of a stand-alone section unbundling obligation under section 271(c)(2)(B) is clearly contrary to the purposes and provisions of the Act as well as

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03-1396 (D.C. Cir. *pet. for rev. filed* Nov. 5, 2003). The Commission also chose to treat the *Ex Parte Letter* as a new forbearance petition ("*Verizon Petition*"). *See id. See also, In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003) ("*SBC Petition*"); Public Notice, DA 03-3608 (rel. Nov. 10, 2003).

[6] *Verizon Petition* at 5.

[7] *SBC Petition* at 8 (citation omitted).

[8] *Id.* at 2.

[9] Comments of Qwest Communications International Inc., CC Docket No. 01-338, filed Nov. 17, 2003; Reply Comments of Qwest Communications International Inc., WC Docket No. 03-235, filed Dec. 12, 2003.

recent court decisions that have limited the scope of unbundling obligations under the Act.

A. An Independent Section 271 Unbundling Obligation Is Inconsistent With Relevant Court Decisions

In the first 400 pages of the *Triennial Review Order*, the Commission adopted and applied a detailed, multi-factored test for each category and variation of network element to determine when incumbent local exchange carriers ("ILECs") are required to provide unbundled access to such elements pursuant to section 251. Then, based on almost no analysis, the Commission in large measure undid its extensive section 251 impairment analysis by concluding that the BOCs are subject to a vague, undefined independent unbundling obligation under section 271(c)(2)(B). By deciding that a network element must be unbundled under section 271 -- potentially indefinitely[10] -- even after a competitive local exchange carrier ("CLEC") is no longer deemed to be impaired without access to such element pursuant to section 251(d)(2), the Commission has dramatically broadened the scope of the BOCs' unbundling obligations. This is a result that is wholly inconsistent with recent court decisions that have interpreted the Act as *limiting* the ILECs' unbundling obligations to clearly defined circumstances.

In *AT&T Corp. v. Iowa Utilities Board*,[11] the Supreme Court unambiguously stated that in making unbundling decisions, the Commission must "apply *some* limiting standard, rationally related to the goals of the Act[.]"[12] The Commission's section 271 unbundling decision -- to which no limiting standard was applied and which, as explained below, is directly contrary to the goals of the Act -- is clearly at odds with the Supreme Court's admonition in *Iowa Utilities*

[10] While the *Triennial Review Order* refers to an "ongoing" obligation, it provides no guidance as to whether, when and how such obligation could be lifted, suggesting that unbundling could in principle be required in perpetuity.

[11] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[12] *Id.* at 388 (emphasis in original).

Board.

The Commission's decision on the section 271 issue is also inconsistent with the findings in *United States Telecom Ass'n v. FCC.*[13] In that case, the D.C. Circuit firmly rejected the notion that "more unbundling is better[,]" stating that "Congress did not authorize so open-ended a judgment."[14] The court in *USTA* also held that in the absence of genuine impairment, the Commission must "point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible."[15] Warning against the "synthetic competition" that would result from over-reliance on unbundling the court also held:

> [M]andatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource. *Iowa Utilities Board*, 525 U.S. at 428-29. And, as we said before, the Court's opinion in *Iowa Utilities Board* ... plainly recognized that ***unbundling is not an unqualified good*** ... In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs [noted in Justice Breyer's separate opinion in *Iowa Utilities Board*] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition.[16]

While the *Iowa Utilities Board* and *USTA* cases dealt with the ILECs' unbundling obligations under section 251, these courts' findings on the pernicious effects of excessive unbundling apply with equal force to any independent unbundling obligations under section 271. In either case, mandatory unbundling will result in "disincentives to research and development" and the "tangled management inherent in shared use of a common resource," leading to the "synthetic competition" condemned by the court in *USTA*.[17] Given the "common purpose

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[13] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 123 S. Ct. 1571 (Mar. 24, 2003).

[14] *Id.* at 425.

[15] *Id.*

[16] *Id.* at 429 (emphasis added).

[17] *Id.*

between sections 251 and 271,"[18] it would make absolutely no sense for Congress to have placed strict limits on the Commission's ability to impose unbundling pursuant to one provision of the Act (section 251), while including another unbundling provision (section 271) that effectively sets no limits at all.

The scope of the section 251 and section 271 unbundling obligations is in most ways practically identical. The only real difference between section 251 unbundling and section 271 unbundling is that the former must be provided at TELRIC prices while the latter (according to the *Triennial Review Order*) must be "priced on a just, reasonable and not unreasonably discriminatory basis -- the standards set forth in sections 201 and 202."[19] In fact, the exact level of pricing to be applied to network elements unbundled pursuant to section 271 is the subject of considerable uncertainty, with parties already claiming that the TELRIC pricing rules should be applied to elements unbundled pursuant to section 271. For example, in their Opening Brief filed with the D.C. Circuit in connection with the Petition for Review of the *Triennial Review Order*, the CLEC Petitioners argue that the BOCs should not be permitted to "charge rates for elements obtained under the [section 271] checklist higher than the rates set out in the FCC's UNE pricing rules."[20] While neither the Act, nor policy nor logic provides any support whatsoever for the CLECs' interpretation of the section 271 pricing rules, their argument still offers a crystal clear indication of the CLECs' objective of keeping the UNE-Platform ("UNE-P") alive at TELRIC rates even after relevant elements are no longer required to be unbundled under section 251.

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[18] *See infra* at 11.

[19] *Triennial Review Order* ¶ 656 (citation omitted).

[20] Opening Brief of CLEC Petitioners and Intervenors in Support, D.C. Cir. Nos. 00-1012, 03-1310 (and cons. cases), filed Dec. 1, 2003.

There can be little doubt that the CLECs will likely receive a receptive audience to their arguments on the pricing issue in some states. Although the Commission has clearly stated that it, not the state commissions, has oversight over the rates for elements unbundled under section 271,[21] the "CLECs say [that] states do have a role" in "setting prices under §§ 201 and 202 for UNEs required under section 271."[22] There is therefore a real danger that the price for section 271 unbundled network elements will be driven down to TELRIC-like levels, in which case any real difference between the two types of unbundling obligation will narrow or disappear entirely.

For these reasons, the Commission's decision regarding the scope of the section 271 unbundling requirement should adhere to the courts' insistence that *all* unbundling decisions must be tied to some rational showing of impairment. In the *Triennial Review Order*, the Commission did not even *attempt* to undertake such an analysis in the section 271 context, nor did it make any showing that its decision would "bring on a significant enhancement of competition," as required by *USTA*. Accordingly, because it was made without the requisite analysis, the Commission's decision to impose an independent and ongoing unbundling obligation under section 271 was clearly unjustified.

B. An Independent And Ongoing Section 271 Unbundling Obligation Is Contrary To The Act's Objective Of Promoting Facilities-Based Competition

One of the central purposes of the Act is the promotion of facilities-based competition. This goal has been repeatedly acknowledged, not only by the courts,[23] but also by the

[21] *Triennial Review Order* ¶ 664.

[22] *See,* Summary of TRIP Triennial Review Meeting Discussions, Washington, D.C. at 2 (October 10, 2003), available at *www.naruc.org/programs/trip/summaryoct03.pdf.*

[23] *See, e.g., Competitive Telecommunications Association v. Federal Communications Commission,* 309 F.3d 8, 16 (D.C. Cir. 2002), where the Court of Appeals for the District of Columbia Circuit found that "the Supreme Court's discussion of the incentive effects of TELRIC in *Verizon Communs., Inc. v. FCC* . . . would be meaningless if the Court had not understood the Act to manifest a preference for facilities-based competition[]" and that the Supreme Court

Commission itself. For example, the Commission has recognized that "in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition" because "only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing."[24] Similarly, the Commission has recognized that unbundling rules that "encourage competitors to deploy their own facilities . . . will provide incentives for both incumbents and competitors to invest and innovate, and will allow the Commission and the states to reduce regulation once effective facilities-based competition develops."[25] In the *Triennial Review Order* itself, the Commission stressed its awareness that "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."[26]

Creating an independent and ongoing unbundling obligation under section 271 with respect to network elements that are no longer subject to unbundling pursuant to section 251 -- because CLECs are not impaired without unbundled access to such elements -- is clearly at odds with the well-founded policy described above. In particular, a stand-alone unbundling obligation under section 271 will lead to more unbundling over a much longer (possibly indefinite) period, thereby discouraging the development of effective facilities-based competition. The availability

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"obviously" accepted "the ILECs' view that Congress preferred 'facilities-based competition' over 'parasitic free-riding[]'" (citation omitted).

[24] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12673, 12676-77 ¶ 4 (footnote omitted), 12685-86 ¶ 23 (1999).

[25] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3701 ¶ 7 (footnote omitted) (1999) ("*UNE Remand Order*").

[26] *Triennial Review Order* ¶ 3.

of network elements on an unbundled basis pursuant to section 271 will have a particularly deleterious effect where there has been a formal finding of non-impairment under section 251, which would indicate that conditions are ripe for facilities-based competition. Moreover, making unbundled network elements available under section 271, potentially indefinitely, will only serve to reduce further the economic and operational incentives for CLECs to make serious investments in their own facilities. Accordingly, the Commission's decision is bound to achieve exactly the opposite of the Act's objective of promoting facilities-based competition.

In the case of narrowband facilities, unbundling obligations that survive beyond a finding of non-impairment will unquestionably undermine the development of facilities-based competition. This will be particularly true if the CLECs prevail in their effort to preserve UNE-P through section 271,[27] which would result in the perpetuation of the "synthetic competition" condemned by the D.C. Circuit in the *USTA* court even after a finding of non-impairment under section 251. The most direct way to avoid this perverse result is to conclude that the obligation to provide unbundled access to a network element under section 271 is extinguished upon a finding that such network element need not be unbundled pursuant to the section 251 impairment test.

With respect to broadband network elements, the Commission's section 271 unbundling decision will clearly frustrate the fulfillment of section 706(a) of the Act, which requires the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans." Section 706(a) explicitly encourages the Commission to use all means consistent with the public interest, including "regulatory forbearance," to "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment." In the *Triennial*

[27] *See supra* at 6-7.

Review Order, the Commission acknowledged that section 706 requires the Commission to "craft unbundling rules that provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities."[28]

The *Triennial Review Order* recognized the correlation between unbundling requirements and broadband investment incentives, stating that "[t]he effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment."[29] Bearing this in mind, the Commission purported to "eliminate most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire."[30]

The Commission's decision to impose unbundling of network elements pursuant to section 271, even after such elements are no longer required to be unbundled pursuant to section 251, is entirely inconsistent with the above-described policy statements. That decision dramatically broadens, rather than narrows, the scope of BOC unbundling obligations, with no end-point in sight. As such, the independent section 271 unbundling obligation will serve to

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[28] *Triennial Review Order* ¶ 213. *See also, id.* ¶ 198 (recognizing the Commission's "mandate . . . to promote the rapid deployment of advanced services throughout the nation[]"); ¶ 177 (acknowledging that section 706 reflects Congressional intent of factors to be taken into account in making unbundling decisions); and ¶ 288 (stating that unbundling decisions that "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities" would be "in direct opposition to the express statutory goals authorized in section 706[]").

[29] *Id.* ¶ 3.

[30] *Id.* ¶ 4. The Commission thus generally declined to require unbundling of fiber-based local loops on the grounds that doing so would not only "promote investment in, and deployment of, next-generation networks[]" but also motivate CLECs "to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market." *Id.* ¶ 272.

create profound disincentives, for both BOCs and CLECs, to make investments in facilities for advanced telecommunications services. BOCs will have a diminished motivation to make broadband investments due to a well-founded concern that CLECs will be able to access such network elements on highly-favorable terms, allowing them to enjoy substantially all the benefits of the BOCs' broadband investments without assuming any portion of the financial and operational risks taken on by the BOCs in making such investments. For their part, CLECs will have little incentive to invest in their own next generation infrastructure if they know they can lease all needed broadband elements from the BOCs -- potentially indefinitely -- on advantageous conditions. Such a situation would give rise to precisely the sort of "parasitic free-riding" that Congress sought to avoid in adopting the Act[31] and would impede the deployment of reasonably priced next generation services, thereby harming consumers.

C. The Act Clearly Contemplates Removal Of The Section 271 Unbundling Obligation Once The Corresponding Section 251 Unbundling Obligation Has Been Removed

The Commission has previously acknowledged the clear-cut link between the unbundling obligations arising under sections 251 and 271. In the *UNE Remand Order*, the Commission recognized that "there is a common purpose between sections 251 and 271 of the Act of opening the incumbents' monopoly local exchange networks to competition[,]" and that "Congress intended section 251(c)(3) of the Act and the competitive checklist to contain similar, if not identical, obligations."[32] Given the Commission's reasoning, if a network element has been opened to competition for purposes of section 251, then logically the "common purpose"

[31] *Verizon Communications v. FCC*, 535 U.S. 467, 504 (2002).

[32] *UNE Remand Order*, 15 FCC Rcd at 3748 ¶ 109. The Commission's statements in the *UNE Remand Order* regarding the "common purpose" of sections 251 and 271 and the "similar, if not identical, obligations" arising under those two sections is wholly inconsistent with the

reflected in the section 271 unbundling requirement should also be deemed satisfied with respect to that element. Furthermore, even if the unbundling obligations under sections 251 and 271 are "not identical," surely they cannot be interpreted to be so entirely dissimilar that one can remain in effect, potentially in perpetuity, even after the other has been eliminated based on a finding of non-impairment. Accordingly, once an element no longer meets the section 251(d)(2) standard, the purpose underlying the corresponding checklist item (namely opening the market to competition) should be deemed to have been fully achieved.

In reaching its decision to establish a stand-alone unbundling obligation under section 271, the Commission misinterprets the plain meaning of section 271(c)(2)(B). The Commission claims: (A) that checklist item 2 (which covers all network elements that must be unbundled pursuant to sections 251(c)(3) and 251(d)(2)) is duplicative of items 4, 5, 6 and 10; (B) that had Congress wished to make items 4, 5, 6 and 10 subject to section 251, it would have explicitly done so as it did with checklist item 2; and (C) that to conclude otherwise would render items 4, 5, 6, and 10 "entirely redundant."[33]

In fact, the meaning of the statute is clear and entirely consistent with the relief sought in this Petition. Section 271(c)(2)(B) is worded as it is because it contemplated a situation where a network element (for example, switching) came off the section 251 list of unbundled elements ***before*** a BOC applied for in-region interLATA service authorization pursuant to section 271. In this situation, the BOC would have an obligation (at least until it received its section 271 authorization) to continue to provide unbundled access to circuit switching pursuant to section 271(c)(2)(B)(vi), even if there were no corresponding unbundling obligation under section 251.

Commission's finding in the *Triennial Review Order* that "it is reasonable to interpret section 251 and 271 as operating independently." *Triennial Review Order* ¶ 655.

[33] *Id.* ¶ 654.

In addition, the inclusion of items 4, 5, 6 and 10 ensured that, before approving an application under section 271, the Commission would specifically confirm that a BOC applicant was in fact providing unbundled access to loops, switching, transport, databases and associated signaling.

The Commission's reading of the statute is illogical -- among other things, it would keep alive a BOC's unbundling obligation with respect to items 4, 5, 6 and 10 in perpetuity, no matter how competitive the telecommunications market becomes. Moreover, in the situation where a BOC has obtained in-region interLATA service authorization, there is no reason to keep any of the unbundling obligations in checklist items 4, 5, 6 and 10 in effect once the corresponding section 251 obligations have been eliminated. If competitors would not be impaired without access to a network element, there is no justification for continuing to require that element to be unbundled.

The Commission also distinguishes between sections 251 and 271 on the grounds that the former applies to ILECs and the latter to BOCs.[34] In fact, this distinction highlights how irrational it would be to remove unbundling obligations for ILECs under section 251, yet keep unbundling obligations in effect for the identical network elements under section 271 for the BOCs, which cover some 80% of all local access lines.

In fact, the Commission's section 271 unbundling decision is a resounding endorsement of the "more unbundling is better" principle that was specifically rejected by the court in *USTA*. The practical effect of this decision would be to render the section 251 impairment analysis largely superfluous. The pernicious effects arising from this decision will only be heightened in view of CLECs' attempts to drive down section 271 unbundled element prices to TELRIC-like

[34] *Id.* ¶ 655.

levels[35] and to combine or commingle section 271 elements with other section 271 elements and elements unbundled pursuant to section 251.[36] Such a result would essentially lead to the continuation of "synthetic competition" brought about by UNE-P, despite a finding of non-impairment in the nine-month mass market switching proceedings. While the Commission clearly did not intend this result, the CLECs will undoubtedly attempt to game the system and seek unilateral advantage through the state regulatory process, resulting in time consuming and expensive litigation and ongoing regulatory uncertainty. Continuing controversy, litigation and uncertainty are also likely to result from the completely undefined scope of the independent section 271 unbundling obligation.

II. ESTABLISHING AN INDEPENDENT AND ONGOING UNBUNDLING OBLIGATION UNDER SECTION 271 WITH RESPECT TO BROADBAND ELEMENTS WILL IMPOSE SUBSTANTIAL AND UNJUSTIFIABLE OPERATING AND FINANCIAL BURDENS ON THE BOCs

The *Verizon Petition* presents a detailed and well-reasoned analysis of the operating and financial burdens that will arise as a result of the imposition of an independent and ongoing section 271 unbundling obligation with respect to broadband elements.[37] If an independent section 271 unbundling obligation is imposed, Qwest will suffer precisely the same problems identified by Verizon with respect to network redesign requirements; the development and deployment of new systems to support the required unbundling; and the cost and effort required to implement network, operations and systems modifications to conform to the unbundling obligation as it evolves over time.

In addition to the problems identified in the *Verizon Petition*, providing unbundled access

[35] *See supra* at 6-7.

[36] *See supra* at 11-12.

[37] *Verizon Petition* at 9-11.

to the elements of a broadband network would introduce failure points into what should be an integrated network designed for optimal performance. In particular, a broadband network implementing a Fiber to the Premise architecture relies on the use of fiber-optic cable, passive optical splitters, optical network terminals and optical line terminals in a highly-integrated fashion. Deriving an unbundled 64 kbps transmission path from this architecture would not only add significant cost to the network deployment, but also break-up the highly-integrated network architecture and increase the number of elements in the network,[38] thereby introducing additional failure points to the network. Allowing unbundled access to the subloop would add still more cost and points of failure.

These serious difficulties, which as described above are entirely unjustified, will only serve to exacerbate the deleterious effects of the section 271 unbundling requirement.

III. THE CONDITIONS FOR FORBEARANCE HAVE CLEARLY BEEN SATISFIED

Section 10(a) of the Act specifies that the Commission "shall" exercise its forbearance authority if the three conditions set out in section 10(a) are satisfied. As described below, each condition set out in section 10(a) has clearly been met.

A. An Independent Section 271 Unbundling Obligation Is Not Necessary To Ensure That The Relevant Charges, Practices, Classifications, Or Regulations Are Just And Reasonable And Are Not Unjustly Or Unreasonably Discriminatory

The establishment of an independent and ongoing unbundling obligation under section 271 is not necessary to ensure that the relevant charges, practices, classifications or regulations

[38] Examples of such additional network elements include integrated access devices at the customer's premises to derive the 64 kbps transmission path; a front-end network element to the passive optical splitter to derive the unbundled 64 kbps transmission path; a separate facility to carry the 64 kbps transmission path back to the central office; and a network element in the central office to separate the derived unbundled 64 kbps transmission path for CLEC access.

are just and reasonable and are not unjustly or unreasonably discriminatory.[39] As discussed above, establishment of an independent unbundling obligation pursuant to section 271, far from being "necessary" to ensure just and reasonable practices, will actually result in practices that are unjust and unreasonable, in that they will impose an ongoing unbundling obligation without any showing of impairment or competitive benefit deriving from the decision. Moreover, forbearance will in fact ensure just and reasonable rates. Once a network element no longer needs to be unbundled pursuant to section 251, CLECs are by definition no longer impaired without access to such element. As a result, the market for such element will therefore be competitive, which will ensure that the rates and practices relating to that element are just and reasonable. Lastly, it should be noted that the independent section 271 unbundling decision is discriminatory with respect to broadband elements, in that cable companies, which dominate the broadband sector, providing some 57% of all high-speed connections,[40] are under no obligation to unbundle any of their network elements.

B. An Independent Section 271 Unbundling Obligation Is Not Necessary For The Protection Of Consumers

The establishment of an independent and ongoing unbundling obligation under section 271 is not necessary for the protection of consumers.[41] On the contrary, this decision will cause substantial harm to consumers as a result of the lowered infrastructure investment (narrowband and especially broadband) by ILECs and CLECs alike. This in turn will lead to slower deployment of next-generation networks, less consumer choice and higher prices for advanced services. The Commission itself has stressed that "consumers will benefit from [the] race to

[39] 47 U.S.C. § 10(a)(1).

[40] FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2002* (June 2003), Table 1.

[41] 47 U.S.C. § 10(a)(2).

build next generation networks and the increased competition in the delivery of broadband services."[42] Because the Commission's section 271 unbundling decision will impede, rather than accelerate, the rollout of next-generation networks, that decision will in fact achieve precisely the opposite of the Commission's stated objectives with respect to consumer benefits.

C. The Requested Forbearance Is Consistent With The Public Interest

The requested forbearance is consistent with the public interest.[43] Forbearance is unquestionably in the public interest, as it will motivate both ILECs and CLECs to accelerate the development of narrowband and broadband facilities-based competition. Indeed, as pointed out above, section 706(a) specifically *requires* the Commission to utilize "regulatory forbearance" to encourage the deployment of advanced telecommunications services. Forbearance will also help achieve Congress' intention of implementing the Act in a manner that is "pro-competition" rather than "pro-competitor."[44]

D. The Requirements Of Section 271 Have Been Fully Implemented

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section . . . 271 . . . until it determines that those requirements have been fully implemented." The "requirements" in question are those set out in the section 271 competitive checklist, specifically items 4, 5, 6 and 10. Pursuant to section 271(d)(3)A)(i), the Commission may grant 271 authorization only if it has expressly determined that the BOC in question has "fully implemented the competitive checklist[.]"

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[42] *Triennial Review Order* ¶ 272.

[43] 47 U.S.C. § 10(a)(3).

[44] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd 15499, 15812 ¶ 618 (1996).

With the recent grant of the final section 271 authorization,[45] it is clearer than ever that section 271 is "fully implemented" for purposes of section 10(d). The Commission's rulings demonstrate that all the nation's local exchange markets are now fully open to competition. In this regard, the Commission has in recent years consistently found that a state's local exchange market is open to competition once 271 authorization has been granted in that state. As the Commission has succinctly stated, section 271 "requires BOCs to prove that their markets are open to competition before they are authorized to provide in-region long distance services."[46] Similarly, the Commission has found that one of the "underlying objectives" of section 271 is to "facilitate entry by new entrants into the BOC's local exchange market" by "conditioning BOC entry into the in-region, interLATA market on the BOC opening its local markets to competition."[47]

In other words, once section 271 authority is granted in a particular state, that state's local exchange market is *by definition* fully open to competition. This principle was reaffirmed only two weeks ago in the *Arizona 271 Order*, where the Commission based its decision to grant section 271 authorization in Arizona on the fact that "barriers to competitive entry in Arizona's

[45] *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona,* WC Docket No. 03-194, Memorandum Opinion and Order (rel. Dec. 3, 2003) ("*Arizona 271 Order*").

[46] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20553-54 ¶ 18 (1997).

[47] *In re Application of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14070 ¶ 67 (2000).

local exchange market have been removed, and *the local exchange market is open to competition.*"[48]

It is therefore abundantly clear that the BOCs have "fully implemented the [section 271(d)(3)(A)(i)] competitive checklist" in every state and that the local exchange market in every state is now fully open to competition. Accordingly, the "requirements of section ... 271" should be deemed to be fully implemented for purposes of section 10(d).

CONCLUSION

For reasons set forth above, the Commission should properly grant the relief requested in this Petition.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: John S. Fischer SMT
Andrew D. Crain
Craig J. Brown
John S. Fischer
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2856

Its Attorneys

December 18, 2003

[48] *Arizona 271 Order* ¶ 48 (emphasis added).

CERTIFICATE OF SERVICE

I, Susan M. Tucker, do hereby certify that on this 18th day of December, 2003, I have caused the original and four copies of the foregoing **PETITION FOR FORBEARANCE OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the Secretary of the FCC via hand delivery. A fifth copy is included to be stamped as received and returned to the messenger. An electronic copy of the **PETITION** is being transmitted to the FCC's duplicating contractor, Qualex International, Inc.

Susan M Tucker

Susan M. Tucker

Qualex International, Inc. qualexint@aol.com

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 03-260
Petition for Forbearance Under	)	
47 U.S.C. § 160(c)	)	

REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits this reply to the comments submitted in connection with the Petition for Forbearance (the "Petition") filed by Qwest in this docket.[1] In the Petition, Qwest sets out the reasons why the Federal Communications Commission ("Commission") should exercise its authority to forbear from imposing an independent unbundling obligation pursuant to section 271(c)(2)(B) of the Communications Act of 1934, as amended ("Act"),[2] with respect to both narrowband and broadband network elements that are no longer required to be unbundled pursuant to section 251(d)(2) of the Act. As shown below, none of the arguments submitted by those parties opposing the Petition should properly preclude the Commission from concluding that the statutory conditions for forbearance have been satisfied and that the Petition should be granted.

I. THE REQUIREMENTS OF SECTION 271 HAVE BEEN FULLY IMPLEMENTED

Section 10(d) of the Act provides that "the Commission may not forbear from applying the requirements of section ... 271 ... until it determines that those requirements have been fully

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[1] Petition for Forbearance of Qwest Communications International Inc., filed Dec. 18, 2003. *And see, Public Notice*, DA 03-4084, rel. Dec. 23, 2003.

[2] 47 U.S.C. § 151, *et seq.*

implemented." As demonstrated in the Petition,[3] the requirements of section 271 have been "fully implemented" for purposes of section 10(d) by virtue of the fact that the Bell Operating Companies ("BOCs") have fully implemented the section 271(c)(2)(B) competitive checklist in every state (as a result of which the local exchange market in every state is now fully open to competition).

In its comments, AT&T misconstrues the Commission's recent decision not to forbear from applying the rules which prohibit a BOC's section 272 affiliate from sharing operating, installation and maintenance ("OI&M") functions with that BOC or another affiliate of that BOC.[4] In particular, AT&T claims that in the *Verizon Forbearance Order*, the Commission found that "the grant of authority to provide interLATA service does not compel a finding that the 'fully implemented' requirement is satisfied...."[5] This is a misconstruction of the Commission's finding in the *Verizon Forbearance Order*. In fact, the Commission in the *Verizon Forbearance Order* found only that section 271(d)(3)(B), which specifically requires compliance with the requirements of section 272 (and which is entirely unrelated to the "competitive checklist" requirements set out in section 271(c)(2)(B)), will not be deemed "fully implemented" in a particular state until three years after section 271 authorization has been obtained in that state. The Commission went out of its way to stress that its "analysis here applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced

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[3] Petition at 17-19.

[4] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules,* CC Docket No. 96-149 (Nov. 4, 2003) ("*Verizon Forbearance Order*").

[5] AT&T Comments at 3.

requirements of section 272, and does not address whether any other part of section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[6]

Section 10(d) makes clear that only "those requirements" with respect to which a party seeks forbearance -- in this case, the competitive checklist requirements of section 271(c)(2)(B) -- must be "fully implemented" before the Commission may exercise its forbearance authority. Accordingly, section 271 should be deemed "fully implemented" for purposes of this Petition.

II. SECTION 271(d)(4) DOES NOT BAR THE REQUESTED FORBEARANCE

Several parties claim that section 271(d)(4), which provides that the Commission may not "limit or extend the terms used in the competitive checklist," bars the requested forbearance.[7] This assertion is unfounded and should be rejected. Section 271(d)(4) is aimed at ensuring full implementation of the section 271(c)(2)(B) competitive checklist *before, but not after,* a section 271 authorization has been granted. This conclusion makes perfect sense: prior to approving an application, the Commission justifiably should be foreclosed from modifying or supplanting the list of requirements spelled out in section 271(c)(2)(B). Once a section 271 application has been approved, however, the checklist requirements set out in section 271(c)(2)(B) have by definition been "fully implemented," as required by section 271(d)(3)(A)(i). Thereafter, there is no reason why the Commission should not be entitled to exercise its forbearance authority with respect to those requirements.

Moreover, section 10 explicitly authorizes -- indeed requires -- the Commission to exercise its forbearance authority once the relevant requirements of section 271 have been "fully implemented" and the other conditions of section 10(a) have been satisfied (as is the case here).

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[6] *Verizon Forbearance Order* at ¶ 6 (emphasis added).

[7] *See,* AT&T Comments at 2-3 and Joint Comments of Anew Telecommunications Corp, *et al.* at 2.

There is no plausible reason why Congress would have included a specific reference to forbearance with respect to the provisions of section 271 if section 271(d)(4) were in fact intended to prevent the Commission from *ever* exercising such forbearance authority. Thus, now that the section 271(c)(2)(B) competitive checklist has been "fully implemented" in every state, the Commission clearly has the power to exercise its forbearance authority with respect to the independent unbundling requirement of section 271.

III. AN INDEPENDENT SECTION 271 OBLIGATION WITH RESPECT TO BROADBAND ELEMENTS WILL IMPOSE SUBSTANTIAL AND UNJUSTIFIABLE OPERATING AND FINANCIAL BURDENS ON THE BOCS

As shown in the Petition,[8] the imposition of an independent section 271 unbundling obligation with respect to broadband elements will entail a variety of significant operational and financial burdens on the BOCs. In its comments, MCI relies on faulty reasoning to assert that "section 271 imposes no 'redesign' requirements and [Qwest's] claims are without merit with respect to both hybrid fiber-copper loops and Fiber-To-the-Home ('FTTH') loops."[9] As shown below, MCI's claims are groundless.

Currently, Qwest has not deployed FTTH loops in any part of its local network. Should it do so in the future, Qwest would in fact have to engage in significant "network, operations and systems modifications"[10] to allow for such unbundling. With respect to network changes, Qwest would be required to modify the equipment vendor's configuration to define the demarcations for unbundled access by a competitive local exchange carrier ("CLEC"). Operationally, Qwest would need to design and implement new processes and training procedures to facilitate the required unbundling. In addition, Qwest's inventory, provisioning, monitoring and repair

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[8] Petition at 14-15.

[9] MCI Comments at 2.

[10] Petition at 14.

systems would all need to be modified to show the demarcation designations and track them accordingly. All these modifications would involve substantial time, effort and cost.

MCI's references to Qwest's unbundled packet switching ("UPS") product are similarly ill-informed and misleading. UPS, which was designed specifically to meet the requirements of the *UNE Remand Order,*[11] is a remote access architecture that relies on manual processes and is available only pursuant to the "limited exception" described in the *UNE Remand Order.*[12] In fact, no CLEC request to Qwest has yet resulted in a situation where the conditions set out in the *UNE Remand Order* have been met.

MCI implies that because Qwest has developed operational support systems ("OSS") to support the ordering of the UPS product, the OSS necessary to support *any* function associated with the FTTH product must also be in place. This is patently untrue. As noted above, Qwest's UPS product is supported only by manual processes, which means that provisioning does not automatically flow through Qwest's OSS. The fact is that Qwest has not designed an unbundled FTTH configuration to allow provisioning on a flow through basis; to do so would require substantial effort (and cost) to reconfigure Qwest's OSS.

IV. QWEST'S ARGUMENT IS NOT INCONSISTENT WITH ITS PRIOR ADVOCACY

The Petition demonstrates that the Act contemplates removal of the section 271 unbundling obligation once the corresponding section 251 unbundling obligation has been removed.[13] MCI alleges that it is "disingenuous"[14] for Qwest to make this argument in view of a

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[11] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

[12] *Id.* at ¶313.

[13] Petition at 11-14.

[14] MCI Comments at 6.

statement made in an *ex parte* filing submitted to the Commission by Qwest in 2002.[15] In fact, it is MCI that is acting disingenuously.

MCI purports to quote Qwest in the White Paper as acknowledging that an unbundling obligation exists under section 271 even after a network element no longer must be unbundled under section 251.[16] However, MCI fails to describe the narrow context in which the entire White Paper was prepared. In particular, the White Paper was delivered to the Commission after Verizon had submitted its original Petition for Forbearance[17] regarding the section 271 unbundling issue. In recognition of the fact that this crucial issue was pending before the Commission, the cover page of the White Paper *explicitly* noted the filing of the Verizon Petition and added that "[f]or purposes of this *ex parte* ... we have assumed that the corresponding section 271 obligation is still in force."[18] In other words, Qwest's entire argument in the White Paper, including the language quoted by MCI, was based on the assumption that the Commission ultimately would find that an independent section 271 unbundling obligation exists (despite the arguments raised by Verizon and others supporting its view). Moreover, Qwest has *never* accepted the validity of that assumption; indeed, this docket (and the related dockets involving the petitions for forbearance filed by Verizon and SBC and BellSouth's petition for reconsideration of the independent section 271 unbundling obligation) centers on the reasons why an independent section 271 unbundling obligation should be rejected. Since the language

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[15] "Regulation of an Element Found No Longer to Meet Section 251's 'Necessary and Impair' Test, " attached to *ex parte* letter from Cronan O'Connell to Marlene H. Dortch, CC Docket No. 01-338, filed Nov. 21, 2002 ("White Paper," a copy of which is attached as an Appendix to these Reply Comments).

[16] *See* MCI Comments at 5-6.

[17] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338, filed July 29, 2002.

[18] White Paper at n.1.

quoted by MCI was unambiguously tied to an assumption to which Qwest did not, and does not, subscribe, that language is of no relevance whatsoever to Qwest's past or current position on the section 271 unbundling issue. As such, there is no basis whatsoever for MCI's misleading assertion that Qwest's past advocacy is inconsistent with its arguments in this proceeding.

CONCLUSION

For reasons set forth above, the Commission should grant the relief requested in the Petition.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: John S. Fischer
Andrew D. Crain
Craig J. Brown
John S. Fischer
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2856

Its Attorneys

January 30, 2004

Qwest
1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3121
Fax 202.293.0561

Cronan O'Connell
Vice President-Federal Regulatory

EX PARTE

November 21, 2002

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A325
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

The attached paper titled: *Regulation of an Element Found No Longer to Meet Section 251's "Necessary and Impair" Test* filed on behalf of Qwest Communications International Inc., has been filed in the above docketed proceedings.

In accordance with FCC rule 1.49(f), this *Ex Parte* paper is being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to FCC Rule 1.1206(b)(1).

Sincerely,
/s/ Cronan O'Connell

cc's (all via E-mail)

Christopher Libertelli (cliberti@fcc.gov)
Matthew Brill (mbrill@fcc.gov)
Jordon Goldstein (jgoldste@fcc.gov)
Daniel Gonzalez (dgonzale@fcc.gov)
Bill Maher (wmaher@fcc.gov)
Michelle Carey (mcarey@fcc.gov)
Thomas Navin (tnavin@fcc.gov)
Brent Olson (bolson@fcc.gov)
Robert Tanner (rtanner@fcc.gov)

Attachment

Regulation of an Element Found No Longer to Meet Section 251's "Necessary and Impair" Test

I. A BOC's Provision of an Element Required Pursuant to Section 271, Exclusively, Should be Regulated Subject Only to the Commission's General Pricing Authority Under Sections 201 and 202 of the Act.

A. The Commission Already Has Established that Once an Element Comes Off Section 251's Unbundling List and Is Provided Solely Pursuant to Section 271, the Only Pricing Requirements that Apply Are The Generic Title II Pricing Requirements.

The Commission already has recognized that once it has "determined that a competitor is not impaired in its ability to offer services without access to [a particular] element," and the element is offered pursuant only to Section 271 of the Act, the "market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market."[1/] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3906 ¶ 473 (1999) ("*UNE Remand Order*"). While the Commission recognized that Section 271 might in many cases impose an independent obligation on the BOC to provide the element in question, the Commission correctly concluded that "the prices, terms, and conditions set forth under Sections 251 and 252 do *not* presumptively apply to the network elements on the competitive checklist of Section 271." *Id.* at 3905 ¶ 469 (emphasis added). Rather, the Commission determined that the Section 252 pricing requirements apply *only* when the checklist element is unbundled pursuant to Section 251.

1/ Qwest notes that Verizon has filed a Petition for Forbearance, CC Docket No. 01-338 (July 29, 2002), arguing that where the Commission has found that an element no longer satisfies the section 251(d)(2) test, it should deem the corresponding section 271 checklist item to be satisfied and thus forbear under 47 U.S.C. § 160(c) from requiring its provision. For purposes of this ex parte, however, we have assumed that the corresponding section 271 obligation is still in force.

Where the Commission finds that a network element no longer meets the unbundling standards in Section 251(d)(2), because competitors "can acquire [the element] in the marketplace at a price set by the marketplace . . . it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices." *Id.* at 3906 ¶ 473. Instead, the Commission determined, "the applicable prices, terms and conditions for that element [should be] determined [solely] in accordance with Sections 201(b) and 202(a)." *Id.* at 3905 ¶ 470.

B. The Commission Should Relax the Tariffing Requirements for a BOC's Provision of an Element That No Longer Must Be Unbundled Pursuant to Section 251's "Impair" Test.

Having found that it would be counterproductive to apply TELRIC to the prices for checklist elements that are found to no longer meet the impair test under Section 251, the Commission should similarly conclude that it is not appropriate to subject the provision of that element to dominant carrier regulation. Although *all* telecommunications services provided by an ILEC are presumptively treated as dominant, *see, e.g.*, Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd, 22745, 22747-48 ¶ 5 (2001); Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, 15767 ¶ 13 (1997) ("*LEC Classification Order*"), in finding that an element no longer meets the Section 251 "impair" test, the Commission makes the same findings that are essential to support the conclusion that BOCs lack market power with respect to the provision of that element. Specifically, in finding that CLECs would not be impaired without *any* access to an incumbent's network element, the Commission *necessarily* finds that CLECs can practicably obtain that element (or suitable substitutes for that element) elsewhere (including through self-provisioning) and that there are no material barriers to doing so. If the BOC cannot "profitably . . . raise and

sustain" prices "significantly above competitive levels by restricting its own output," Commission precedent establishes that with respect to the provision of that element, the BOC is non-dominant. *LEC Classification Order* at 15762-63 ¶ 6.[2/] The Commission accordingly should both find that an ILEC's provision of an element that has been found to no longer meet the 251 checklist is nondominant, and forbear under Section 10 of the Act from dominant carrier regulation in connection with the incumbent's provision of such an element.[3/]

At a minimum, even if the Commission is not prepared to make a finding that the BOC's provision of such elements is non-dominant—or is not prepared to forbear entirely from dominant carrier regulation—the Commission should require only streamlined federal tariffing of the element, such as that available under the Commission's pricing flexibility rules.[4/] The Commission has recognized that such modified tariff regulation is appropriate where the market

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[2/] The Commission has consistently recognized in finding services non-dominant that not just actual but "potential competition can ensure that prices continue to remain just and reasonable" enough to support a finding that the market will not be subject to distortion by any one player. Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3323-34 ¶ 96 (1995) ("*AT&T International Reclassification Order*").

[3/] Given the Commission's conclusion that section 201 will govern the provision of elements offered pursuant to section 271 of the Act, dominant carrier pricing regulation would no longer be "necessary to ensure that the [ILEC's] charges [or] practices" in connection with that element "are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a). Such forbearance will "promote competitive market conditions." 47 U.S.C. § 160(b). *See LEC Classification Order* at 15806-07 ¶ 88 (recognizing that dominant carrier tariff regulations can "stifle price competition and marketing innovation"); *see also AT&T International Reclassification Order* at 3288 ¶ 27; Second Report and Order, *Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1509 ¶ 175 (1994).

[4/] Even if the Commission determines that some form of minimal tariff regulation is appropriate for such elements, any such regulation should be imposed only on the *federal* level. As Qwest and others have explained, any *state* regulation of the pricing or other terms under which de-listed elements are offered would be preempted. *See* Ex Parte Letter from Herschel L.

has become sufficiently competitive, and there are enough available alternatives, to prevent the ILEC from "exploit[ing] over a sustained period any individual market power," even if the Commission could not conclude that the ILEC could meet the test for a showing of non-dominance.[5/] Thus, while the Commission was not prepared to make a finding that ILEC's provision of interstate intraLATA toll service was non-dominant, for example, the Commission found the market sufficiently competitive to justify a modified tariffing regime, permitting ILECs to file tariffs on one day's notice without cost support and with a presumption of lawfulness. *Pricing Flexibility Order* at 14249-51. The Commission similarly permitted ILECs to offer contract tariffs with tailored term and volume discounts. *Id.* at 14234.

A finding of no-impairment clearly meets this "substantial competition" standard for relaxed tariffing requirements. As noted above, the CLEC's other options remove any ability or incentive for the incumbent to act anticompetitively. Modified tariff regulation would allow the Commission additional pricing authority to supplement its general Section 201 authority, while still providing BOCs with the flexibility to offer competitive services and the freedom from the full panoply of burdensome dominant carrier regulation.

Abbott, Jr., BellSouth, R. Steven Davis, Qwest, Paul Mancini SBC, & Susanne Guyer, Verizon to Michael K. Powell, Chairman, FCC at 8-9 (Nov. 19, 2002).

[5/] *See* Fifth Report and Order, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd 14221, 14247-48 ¶ 53 (1999) ("*Pricing Flexibility Order*"), *aff'd sub. nom WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

II. The Requirements of Providing an Element Under Section 251 Are Not Applicable When the Element Is Provided Solely Subject to Section 271.

A. The Specific Terms and Conditions Required Under Section 251 Do Not Apply to Elements Provided Under Section 271.

As noted above, the Commission has expressly concluded that "the prices, terms, and conditions set forth under Sections 251 and 252" are not applicable to an incumbent's provision of a network element that no longer must be unbundled pursuant to Section 251, and is provided solely pursuant to Section 271. *UNE Remand Order* at 3905-06 ¶¶ 469-73. The Commission's discussion in the *UNE Remand Order* applies equally to both pricing and the other terms and conditions that the Commission has required under Section 251(c)(3) of the Act. The only way that the requirements of either Section 251(c)(3) or Section 252(d)(1) could apply to checklist elements provided solely under Section *271* of the Act is through Section 271(c)(2)(B)(ii), which authorizes the Commission to ensure that BOCs seeking long distance authority provide "[n]ondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)." Because the plain language of the statute does not differentiate between the applicability of the requirements of Sections 251(c)(3) and 252(d)(1), the Commission's determination in the *UNE Remand Order* that this provision of Section 271 provides no basis for continuing to apply the pricing terms of Section 252(d)(1) to an element *that no longer must be unbundled under Section 251* must similarly preclude the continued application of the terms and conditions under Section 251(c)(3).

This outcome makes perfect sense. Having determined that a CLEC is not impaired without access to an element because that element is competitively available and is no longer included in the unbundled elements referred to in Section 251(c)(3), there are no remaining applicable "requirements" under Section 251(c)(3) (or 252(d)(1)) as to that element. At that point, therefore, the reference in the Section 271 checklist to the "requirements" of Section

251(c)(3) with respect to that element should be deemed automatically satisfied or simply nullified. This statutory reading also is the only one that produces a sensible policy result: if an element is competitively available, there is no reason to mandate the particular terms under which that element is offered whether by a BOC or any other ILEC. Since, as the Commission has recognized, the goal of Section 251 unbundling is to produce terms that "at best, [are] designed to reflect" the terms that would result in "a competitive market," *UNE Remand Order* at 3906 ¶ 473, it makes little sense to regulate the terms of any class of providers in the market once the market has been found to be functioning in a competitive fashion.

Thus, once the Commission determines that an element on the 271 checklist no longer must be unbundled under Section 251, a BOC that seeks to obtain or maintain its long distance authorization simply must provide that element in accordance with the general nondiscrimination and reasonableness requirements contained in Sections 201 and 202. For example, Section 251(c)(3) would no longer directly impose the combinations rules on an element that the Commission has determined need no longer be unbundled at all under Section 251. And the combination rules are not—and cannot—be reintroduced through Section 271. Indeed, the Commission already reached this conclusion in the Texas 271 proceeding, recognizing first that where the requirement to combine elements under Section 251 had been extinguished, Section 271 supplied no independent basis to require such combination. *See* Memorandum Opinion and Order, *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18474-75 ¶ 235 (2000) (where Section 251 does not require combination, SWBT "need not provide [that combination] at all."). Second, the

Commission concluded that SWBT certainly could not be precluded from *charging* for performing such combinations where it did in fact provide them. *Id.* (Commission "precluded . . . from denying [SWBT's 271] application on the ground that SWBT has somehow violated the Act by setting particular pricing conditions on the provision of UNE combinations" that were no longer required under Section 251.). Even if the Commission determined that an ILEC could be required to provide some combinations pursuant to Section 201, the ILEC would simply have to do so in a nondiscriminatory and reasonable manner, and there would be no valid basis to prohibit or otherwise regulate reasonable charges for the work required to provide those combinations.

For example, to the extent that loops remain subject to Section 251 of the Act , the BOCs (and all incumbent LECs) will continue to provide them subject to the requirements of that provision. If, however, the Commission were to remove switching from Section 251's ambit, BOCs would continue to provide switching *solely* pursuant to Section 271, and thus at market prices, rather than at TELRIC. A CLEC that wished to obtain the equivalent of UNE-P at that point accordingly would be entitled to obtain the TELRIC rate for the loop, but would have to pay the market price for switching, including the cost for any work the ILEC were required to do to combine the loop with the switch. The same would be true with respect to the shared transport element (and any work required to combine shared transport with another element), which could no longer meet the Section 251 "impair" test if switching were found to no longer meet that test. *See UNE Remand Order* at 3708 (finding that "[i]ncumbent LECs are not required to unbundle shared transport where they are not required to offer unbundled local circuit switching"). Of course, a BOC alternatively could provide an entirely market-priced product, at its option,

charging a market rate for all elements typically included in "UNE-P" and treating combinations charges in whatever manner the market demands.

B. The Provisions of 252 Relating to Interconnection Agreements Do Not Apply to the Provision of an Element That Is Required Solely Under Section 271.

The Commission should clarify that terms for elements a BOC must provide pursuant to Section 271—but no longer pursuant to Section 251(c)(3)—need not be included in Section 252(a)(1) interconnection agreements. The Commission already has expressly recognized that obligations not created by section 251 of the Act need not be addressed in parties' interconnection agreements. *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3703 ¶ 22 (1999) (*cert. denied, sub. nom, Global Naps, Inc. v. FCC*, 122 S. Ct. 808 (2002) ("Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may *voluntarily* include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act.") (emphasis added). The Commission recently confirmed this position in its order responding to Qwest's petition for declaratory ruling regarding the scope of section 252(a)(1)'s filing requirements. There, the Commission indicated that, as contemplated by sections 251 and 252, an "interconnection agreement" was an "agreement[] to implement" a carrier's duties pursuant to "sections 251(b) and (c)." Memorandum Opinion and Order, *Qwest Communications International Inc.*, WC Docket No. 02-89, FCC 02-276 (rel. Oct. 4, 2002) (emphasis added).

The contrary rule—that BOCs are required to include the terms and conditions of the provision of elements required solely under section 271 in their section 252 interconnection agreements—would have perverse results. As noted above, once provision of an element is no longer required under section 251 but only under section 271, the pricing of that element is

properly subject only to the market-based pricing principles of 47 U.S.C. 201. If, however, BOCs were required to include the pricing terms for such elements in their 252 agreements, those pricing terms would be subject to the arbitration requirements through which most 252 agreements are determined. Thus, if a CLEC did not want to agree, during negotiations with the BOC, to the market price offered by the BOC for a particular section 271 checklist item, the CLEC could demand arbitration, which would mean that the *state* ultimately would have to set the rate for the provision of that element. But this result would be entirely inconsistent with the fact that the pricing of that element would be subject only to the reasonableness and non-discrimination requirements of section 201.

III. Once the Commission Recognizes that the Marketplace Has Changed Such That an Element Should Come Off the List, It Should Ensure That Its Decision Is Implemented as Soon as Possible To Eliminate Regulatory Lag.

In finding that an element no longer satisfies the impair test, the Commission necessarily recognizes that there is no longer any justification under the Act, or the policies of the Act, to mandate that ILECs unbundle that element—especially at TELRIC rates. To the contrary, continuing to require unbundling at below-cost TELRIC rates will discourage facilities-based investment in favor of economically inefficient, and irrational, UNE-based entry. Thus, the Act requires that any transition for eliminating the unbundling obligation for an element be streamlined and limited, so that ILECs are not subject to unnecessary burdens and so that the industry as a whole can benefit from increased, market-based competition as soon as practically possible.

As the industry's experience with the implementation of the *ISP Remand Order*[6/] demonstrates, however, in order to achieve that goal, the Commission needs to take explicit actions to ensure a smooth and short transition period, rather than leaving this issue to the parties to work out. Otherwise, it may well take years for the Commission's determinations to be implemented. Because interconnection agreements are usually several years long, are subject to the pick and choose rules, and are typically renewable, it can be extremely difficult to extirpate an interconnection agreement obligation that has since been invalidated by subsequent FCC rulings. Even where the agreements have "change of law" provisions, these provisions in some cases may not be triggered until the Commission's order has been finally appealed (and any remand proceedings are complete); further, CLECs typically have contended that the change in law provisions are not self-executing, so that any resulting revisions to the agreement must be negotiated. When the Commission eliminates an unbundling or similar obligation, CLECs clearly do not have any incentive to facilitate that elimination; rather, they have strong incentives to delay the process. Indeed, in Qwest's own experience, after the issuance of the *ISP Remand Order*, some CLECs did not even bother to respond to Qwest's repeated requests that the FCC's new rules be implemented. Thus, as a practical matter, notwithstanding the Commission's recognition that ISP traffic is not properly subject to the reciprocal compensation requirements and that payment of such compensation on ISP-bound traffic had created significant, market distorting opportunities for regulatory arbitrage, ILECs continue in many instances to be subject to obligations to pay reciprocal compensation on ISP-bound traffic.

6/ Order on Remand, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

To avoid a repeat of this experience, the Commission should accordingly take several actions to facilitate the transition to its new rules. First, the Commission should make clear that it will expect, and permit, parties to begin the process of negotiating new agreements or provisions right away to implement the change in law, whether or not the parties' agreement provides that the amended provision would be immediately effective. In this way, the parties could ensure that the new agreement or term would be in place as soon as the "change in law" provision was satisfied *or* as soon as the existing agreement has expired—whichever is first. This rule should apply even if the contract provides that no negotiations need begin until after the order is final and all appeals have been exhausted. The Commission should make clear that any refusal to negotiate the required amendment would be deemed a violation of the section 252(b)(5) duty to negotiate in good faith. Further, the Commission should clarify that *either* party to the interconnection agreement can trigger the duty to negotiate the required revisions. *See* Order on Reconsideration, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806, 17825-26 ¶¶ 34, 35 (2000) (both incumbent and competitive LECs have the duty to negotiate open issues in interconnection agreements in good faith).

Second, the Commission should make clear that any new agreements that are entered into following the issuance of the Commission's order, or any agreements that are renegotiated, *must* be consistent with the Commission's amendment to the rules (unless, of course, the Commission order has been vacated by the court of appeals). In other words, the Commission should make clear that states are specifically preempted from requiring unbundling that is inconsistent with the Commission's revised rules simply because any appellate review of those rules is not yet complete. The Commission adopted essentially this rule in the *UNE Remand Order*, at

3766 ¶ 151 ("We expect parties to implement the requirements of this Order as they negotiate new interconnection agreements.") and in the *ISP Remand Order*, at 9189 ¶ 82 ("The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements."); it should do so more explicitly here. Further, the Commission should make clear that CLECs cannot evade this rule by trying to opt in to or renew existing agreements that implement the superceded obligation. For this purpose, the Commission should clarify that agreements renewed after the issuance of the FCC order are "new" agreements, including agreements that are renewed on a month-by-month basis, and thus would be subject to whatever the new Commission rules are (including any transition period as discussed below).

Third, to the extent the Commission concludes that it must adopt a transition period to allow UNE-based CLECs with embedded bases to adapt their plans to accommodate the new rules, it should establish a discrete time period for that transition which will begin the date the Commission's order is issued. The Commission should make clear that the transition period will allow CLECs whose agreements expire during that period, or CLECs whose rights would be affected by the triggering of the change of law provisions in an existing agreement, to enjoy whatever the Commission's transition rules are until the expiration of that period—*e.g.* 12 months from the date of the issuance of the order. However, CLECs whose agreements are longer than the transition period and whose agreements are not impacted during the transition period by the change in law, will not be permitted to take advantage of that transition period at all, since it is outside the calendar timeframe that the FCC provided for the transition; rather, they will be expected to begin preparing for the transition during the course of their existing agreement. Thus, if the Commission were, for example, to adopt a one year transition period for an element that was coming off the UNE list and it took an ILEC and a CLEC three months to

determine the terms of a new agreement consistent with the Commission's new rules, the remaining transition period would be nine months since in total that would have given the CLEC the full year mandated by the Commission.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 03-260, 2) served, via email on Ms Janice Myles, Wireline Competition Bureau, Competition Policy Division at janice.myles@fcc.gov, 3) served, via email on the FCC's duplicating contractor Qualex International, Inc., at qualex.int@aol.com and 4) served, via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

Richard Grozier
Richard Grozier

January 30, 2004

James M. Smith.....Joint Commentors
Davis Wright Tremaine, LLP
Suite 450
1500 K Street, N.W.
Washington, DC 20005-1272

Christopher J. Wright.....Z-Tel
Harris, Wiltshire & Grannis, LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036

Kimberly A. Scardino
Dennis W. Guard
MCI
1133 19th Street, N.W.
Washington, DC 20036

Ruth Milkman.....MCI
A. Renee Callahan
Lawler, Metzager & Milkman
Suite 802
2001 K Street, N.W.
Washington, DC 20006

Jim Lamoureux
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
Suite 400
1401 Eye Street, N.W.
Washington, DC 20005

David W. Carpenter.....AT&T
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603

David L. Lawon.....AT&T
C. Frederick Beckner III
Jaçqueline G. Cooper
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005

Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
AT&T Corp.
One AT&T Way
Room 3A250
Bedminster, NJ 07921

Craig T. Smith
Sprint Corporation
6450 Sprint Parkway
KSOPHN0214-2A671
Overland Park, KS 66251

H. Richard Juhnke
John E. Benedict
Sprint Corporation
Suite 400
401 Ninth Street, N.W.
Washington, DC 20004

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 22nd day of March 2004 served a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by electronic mail and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

/s/ Lynn Barclay
Lynn Barclay

*** via electronic mail**

Service List WC Docket No. 04-48

+Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room TW-B204
Washington, DC 20554

+Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554

+Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
Federal Communications Commission
445 12th Street, SW
Rm. 5-C327
Washington, DC 20554

Julia O. Strow
Vice President – Regulatory & Industry Relations
Cbeyond Communications
320 Interstate North Parkway, SE,
Suite 300
Atlanta, GA 30339

Leonard J. Cali
Lawrence J. Lafaro
Dina Mack
AT&T Corp.
Room 3A232
One AT&T Way
Bedminster, NJ 07921

H. Richard Juhnke
John E. Benedict
401 Ninth Street, N.W.
Suite 400
Washington, DC 20004

Craig T. Smith
Sprint Corporation
6450 Sprint Parkway
KSOPHN0214-2A671
Overland Park, KS 66251

William Haas
McLeod USA Telecommunications Service, Inc.
6400 C Street, SW
P.O. Box 3177
Cedar Rapids, IA 52406

John Sumpter
Vice President, Regulatory
Pac West Telecomm, Inc.
4210 Coronado Avenue
Stockton, CA 95204

Praveen Goyal
Senior Counsel for Government & Regulatory Affairs
Covad Communications Company
600 14th Street, N.W. Suite 750
Washington, DC 20005

Kimberly A. Scardino
Dennis W. Guard
MCI
1133 19th Street, NW
Washington, DC 20036

Ruth Milkman
A. Renee Callahan
Richard D. Mallan
Lawler, Metzger & Milkman
2001 K Street, NW, Suite 802
Washington, DC 20006

Richard M. Rindler
Patrick J. Donovan
Ulises R. Pin
Swidler Berlin Shereff Friedman LLP
3000 K Street, N.W.
Washington, DC 20007

+ VIA ELECTRONIC FILING